(19,434.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 73.

THE OTIS COMPANY, PLAINTIFF IN ERROR,

vs.

THE LUDLOW MANUFACTURING COMPANY AND THE LUDLOW CORDAGE COMPANY.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk,

Superior Court. In Equity.

Between—

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,

and

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW Cordage Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Bill of Complaint.

1. The plaintiff owns in fee and is the occupant of a certain mill site with a water mill, to wit—a cotton mill, thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit—the Chicopee river, and is entitled to use for working said mill the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of said power and privileges for the aforesaid purpose of working said mill is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston & Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield road; and on the west by land of Honorah Dunn and land the record title to which stands in the name of the Ludlow Cordage Company.

2 The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition in 1900 and 1901 of some land above the same, by the erection of a suitable building and the purchase of proper machinery to transmit the power so developed to said mill, was in excess of two hundred and fifty thousand dollars ($250,000) including the cost of said machinery and building, which was in excess of fifteen thousand dollars ($15,000).

2. The development of said water power and privilege by the construction of said dam was completed on the 25th day of April 1901; and on the 26th day of said April the plaintiff commenced to use and has since, with only slight interruptions, continuously used said water power and privilege for the purpose of working its aforesaid mill.

Said dam was not erected to the injury of any mill either above

or below it on the same stream, nor to the injury of any mill site on the same stream on which a mill or mill dam had been lawfully erected or used, nor to the injury of any such mill site which had been occupied as such by the owner thereof; and the use of said dam and of said water power and privilege for the present and future working of said mill is a reasonable and necessary one.

3. On the 26th day of September A. D. 1882 the plaintiff was the owner of a portion of said mill site and one Edwin D. Metcalf was the owner of another portion of said mill site and also of other land adjoining the same and bordering on said stream; and thereupon the said Metcalf and the plaintiff entered into an agreement in writing of the tenor following, that is to say—

3 Memorandum of Agreement between the Otis Company and Edwin D. Metcalf, Sept. 26, 1882.

Agreement made this 26th day of Sept., 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business at Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Mass., both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

1st. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river, and extending back therefrom, situate in said Palmer, and known as the Shearer property as soon as reasonably may be, and at such price as the parties hereto may mutually agree upon.

2nd. As soon as said real estate is so purchased, said company agrees to convey to said Metcalf in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

3rd. Said Metcalf agrees to then convey to said company in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river which lies above a point in range with said stake.

4th. Both parties hereto will aid in all reasonable ways in the consum-ation of said purchase of said Shearer property, and not in any unreasonable manner do anything to interfere with such purchase, and said property and no part thereof shall be purchased by either of said parties, or anyone in their behalf except in pursuance of this agreement.

4 5th. Until such purchase shall be consum-ated all work in the way of developing and improving their respective water powers on said river below Three Rivers shall be wholly suspended by the parties hereto.

6th. Said Metcalf or his assignees shall not construct a dam in the development of his or their power, which shall afford more than

21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its, or their power, which shall afford more than 19 65/100 feet fall, or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

7th. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto, unless said company shall fail to purchase said Shearer property, within six months from the date hereof, but in the event of such failure these presents shall become null and void, at the expiration of said period, and whatever rights, if any, under the mill act or otherwise, either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consum-ated as hereinbefore provided.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D METCALF.

And thereafter, to wit--on the 31st day of October, 1882, the plaintiff purchased the Shearer property referred to in said agreement; and thereupon said Metcalf conveyed to the plaintiff all that portion of the Green property owned by him situated on the northerly side of said river and lying above a point in range with the stake referred to in the 3rd article of said agreement; and the plaintiff conveyed to said Metcalf all that portion of said Shearer property which was situated below said stake referred to in the 2nd article of said agreement. And at the time said conveyances from Metcalf to the plaintiff and from the plaintiff to Metcalf were made, the plaintiff and Metcalf, by bolts driven into rocks in said river, marked and indicated the extreme height to which said Metcalf or his assigns could raise the waters of said river by constructing a dam in the development of his or their power under the 6th article of said agreement. The land conveyed by said Metcalf to the plaintiff is a part of the plaintiff's said mill site; and the land conveyed by the plaintiff to said Metcalf together with said lands theretofore owned by him constituted a mill site or privilege capable of development into water power by said Metcalf or his assigns, was subject to the 6th article of said agreement, and was thereafter conveyed by said Metcalf to the Ludlow Cordage Company as hereinafter recited.

4. The defendant The Ludlow Cordage Company was organized in part by stockholders of the Ludlow Manufacturing Company. The two corporations have common interests and are in some respects under a common management. The defendant corporations, for their common benefit and for their common use, purchased of said Metcalf said land conveyed to him by the plaintiff as aforesaid, as well as said other lands owned by him, and, for their common benefit as well as to avoid the easements, restrictions and incumbrances upon the land so conveyed created by said 6th article of said agreement, had the title to said lands conveyed by said Metcalf to said

Ludlow Cordage Company. The defendant corporations
6 made said purchase, paid said Metcalf therefor, and took said conveyance with knowledge and notice of said agreement and of the aforesaid incumbrances, conditions and restrictions thereby created. The Ludlow Manufacturing Company, at or about the time of said conveyance to said Ludlow Cordage Company from said Metcalf, acquired title to certain other parcels of land on said Chicopee river lying below the premises conveyed to the Ludlow Cordage Company by Metcalf as aforesaid, and extending on the banks of the stream more than half a mile. These parcels of land, for convenience, are hereinafter called "A." Some miles below "A" on said stream, but separated from "A" by mill sites and water mills belonging to strangers to this suit, are mills belonging to the Ludlow Manufacturing Company, some of which are operated by it and some of which are operated by the Ludlow Cordage Company.

5. The Ludlow Manufacturing Company is building a dam on said "A" for the purpose, amongst others, of working an electric power plant on said "A" to generate electricity to be transmitted to one or more of said mills of the Ludlow Manufacturing Company below "A," and for the purpose, amongst others, of selling electricity to whoever may purchase it. Said dam and power plant are nearly completed; and said dam is so constructed and is of such a height that when its gates are closed it will raise the waters of said stream upon said mill site of the plaintiff more than twelve feet higher than said bolts, and flood the plaintiff's mill site, and will cause a back water which will flow out and destroy said mill privilege and power developed by the plaintiff as aforesaid, and will in part shut down the plaintiff's mill and machinery therein, and will flood the building and machinery so placed by the plaintiff on said millsite as aforesaid and will cause the plaintiff irreparable injury. Said
7 dam is being erected by said defendants to an unreasonable and unnecessary height to develop a water power far in excess of the reasonable or lawful needs and requirements of the defendants. The water power of the stream is sufficient for the reasonable use and lawful requirements of the plaintiff and defendants; but the defendants have erected said dam to an unreasonable height as aforesaid for the purpose of preventing the plaintiff's enjoying necessary and reasonable use of the waters of said stream and of the water power and privilege developed by the plaintiff as aforesaid.

Unless the defendants are restrained by the order of this court they will forthwith close the gates of said dam and raise the waters of said stream to the aforesaid unreasonable height of more than twelve feet above said bolts and create said back water and flow out and destroy the plaintiff's aforesaid water power and privilege, and shut down its mill and flood and injure its buildings and machinery and cause it irreparable damage and injury as aforesaid.

The plaintiff prays that the defendants and their officers, agents and servants may be perpetually enjoined from flooding the plain-

tiff's said mill site, backing the waters of said stream upon the plaintiff's said mill and said site, flowing out or injuring or destroying said mill privilege and water power of the plaintiff so developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by the defendants' said dam or otherwise, and that in the meantime, until the further order of this honorable court, the defendants and their officers, agents and servants be restrained

8 by the order and injunction of this court from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mill and said site, flowing out, injuring or destroying said mill privilege and water power of the plaintiff developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by said dam of the defendants or otherwise.

OTIS COMPANY,
By GEORGE F. FABYAN, Treasurer.

I, George F. Fabyan of Brookline in the county of Norfolk and Commonwealth of Massachusetts, treasurer of The Otis Company the above named plaintiff, on oath depose and say as follows:

The facts and circumstances stated in the first and second paragraphs of the foregoing bill of complaint are true and within my own personal knowledge. The facts and circumstances stated in the third, fourth and fifth paragraphs of said bill are believed by me to be true from information which I have received from Roscius C. Newell, Edwin D. Metcalf and others.

GEORGE F. FABYAN.

Oct. 5, 1901.

Subscribed and sworn to before me.

BOYD B. JONES,
Justice of the Peace.

Bill filed October 15, 1901.

9 Copy.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

[Seal of the Superior Court.]

To the Ludlow Manufacturing Company and the Ludlow Cordage Company, each a manufacturing corporation organized under the laws of said Commonwealth and having a usual place of business in Boston, in our said county of Suffolk, Greeting:

We command you that you appear before our superior court, at the rules to be holden at Boston within our said county of Suffolk, on the first Monday of November next, then and there to answer to

a bill of complaint exhibited against you in our said court, by the Otis Company, a manufacturing corporation organized under the laws of said Commonwealth and having a usual place of business in said Boston and to do and receive what our said court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalties, in the law, in that behalf, provided.

Witness, Albert Mason, Esquire, at Boston, the fifteenth day of October in the year of our Lord one thousand nine hundred and one.

JOS. A. WILLARD, Clerk.

9½ [Endorsed:] Hurlburt, Jones & C. No. 569. Eq. Subpœna Otis Company *vs.* Ludlow Mfg. Co. & another. Copy.

Officer's Return.

SUFFOLK, *ss:*

BOSTON, October 18th, 1901.

I this day served the within subpœna upon the within named The Ludlow Manufacturing Company and The Ludlow Cordage Company by delivering to C. W. Hubbard, Esq. treasurer of said Ludlow Manufacturing Company and by delivering to C. N. Wallace, Esq. treasurer of said Ludlow Cordage Company, each an attested copy thereof for their appearance at court as within directed.

ALBERT C. TILDEN,
Deputy Sheriff.

Fees.

Service	1.00
Copies	2.00
Travel	.08
	$3.08

10 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } *ss:*

Superior Court. In Equity.

OTIS COMPANY
v.
THE LUDLOW MANUFACTURING COMPANY ET AL.

Plaintiff's Motion.

And now comes the plaintiff and says that the defendants have closed the waste gates of their said dam and are flowing back the waters of said Chicopee river so that unless restrained by an inter-

locutory order of this court the mill site of the plaintiff and *their* said lower dam will be flowed, and the head of water raised by said lower dam reduced and destroyed and the working of the plaintiff's mill be interrupted and interfered with. Wherefore the plaintiff prays this court for an interlocutory injunction as prayed for in its bill restraining the defendants from closing said waste pipes and flowing the plaintiff's mill site until the further order of the court.

By BOYD B. JONES,
Its Solicitor.

Oct. 31, 1901.

11 SUFFOLK, *ss:*

Superior Court. In Equity.

OTIS COMPANY
v.
LUDLOW MFG. CO.

This cause came on to be heard October 31st 1901 upon an application by the plaintiff for a preliminary restraining order as prayed in the bill, and thereupon the defendant's attorney stating that the waste gates in the Ludlow Manufacturing Co.'s dam have not been closed, or if closed shall be opened, and shall not again be closed without giving the plaintiff forty-eight hours' notice thereof no restraining order is made at this time: this order being made without prejudice in any way to the rights of the plaintiff to further apply for such restraining order or of the defendants to oppose the granting of the same.

By the court:

HENRY E. BELLEW, Ass't Cl'k.

Oct. 31, 1901.

12 COMMONWEALTH OF MASSACHUSETTS, Suffolk, *ss:*

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Manufacturing Company.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant denies the allegations contained in the second paragraph of plaintiff's bill, and on the contrary avers that prior to any act of the plaintiff in the way of developing its said property this defendant had made an appropriation of the undeveloped power of said river to the extent which would be afforded by its dam about to be constructed, had adopted a well defined plan therefor, had duly filed plans and specifications of its proposed work with the county commissioners of the county of Hampden, had occupied its mill site as such, had commenced the erection of said dam and other structures appurtenant thereto, and has ever since continuously and with reasonable despatch proceeded with its said work intending to put in operation a mill, for the working of which the water of said river is to be applied.

13 3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in said third paragraph, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Cordage Company, but denies that said companies have common interests or that they are under a common management.

This defendant admits that the Ludlow Cordage Company purchased certain real estate from said Metcalf, but whether it included that conveyed by the plaintiff to said Metcalf this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

All the other allegations contained in the fourth paragraph of plaintiff's bill relating to the purchase of said Metcalf's land this defendant denies, and it denies that it had any notice of the agreement referred to in plaintiff's bill or of the terms thereof.

This defendant admits that at or about the time of the conveyance to the Ludlow Cordage Company of the Metcalf land it acquired title to certain parcels of land on said Chicopee river lying below the premises conveyed to said Ludlow Cordage Company, but whether these parcels are identical with those designated in plaintiff's bill as "A" this defendant can neither admit nor deny, but leaves it to be hereafter explained.

14 Further answering, this defendant avers that long prior to said conveyance by said Metcalf to said Ludlow Cordage Company, it had acquired from time to time sundry parcels of land including that upon which its dam is now erected and that all of said purchases were in connection with its plan then already conceived and determined to erect its said dam. This defendant's dam is located nearly two miles below the plaintiff's property.

This defendant admits that some distance below its said dam

there is a water mill belonging to a stranger to this suit and below this last mentioned mill are mills of this defendant, a portion of the floor of one of said mills being used and occupied by the Ludlow Cordage Company as lessee.

5. If by the description "A" plaintiff refers to lands purchased by this defendant at or about the time of the conveyance by said Metcalf to said Ludlow Cordage Company, this defendant denies that it is building a dam on such land, but it admits that it has been engaged in building a dam on property acquired by it in or about the year 1891 for the purpose of working its mills and for other purposes reasonably incident to its property, and said dam is now completed.

If the allegation be material, which this defendant denies, this defendant denies that its dam is being constructed to an unreasonable and unnecessary height or with any purpose to prevent the plaintiff's enjoyment of its property, except so far as may inevitably result, but on the contrary this defendant avers that all the power to be generated by said dam is reasonably required by it in the operation and legitimate development of its mills and mill property.

All other allegations contained in the fifth paragraph of plaintiff's bill this defendant denies.

15 6. This defendant avers further that at the time the plaintiff commenced work upon its property it knew that the defendant was then and for some time had been proceeding with the erection of its dam and knew the extent to which the same when completed would set back the waters of said river, but notwithstanding this knowledge the plaintiff took no steps to protect its rights but proceeded with its work in utter disregard of the consequences, and the defendant avers that the plaintiff being at the outset and at all times since in a position to have determined the legal rights of the parties and failing to do so has been guilty of laches and is not entitled to the relief prayed for.

LUDLOW MANUFACTURING CO.,
By its Att'ys, BROOKS & HAMILTON.
R.
CARROLL & McCLINTOCK.
R.

Filed 8 Nov. 1901.

16 COMMONWEALTH OF MASSACHUSETTS, Suffolk, ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Cordage Company.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

2 This defendant neither admits nor denies the allegations contained in the second paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in the third paragraph of the plaintiff's bill, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant admits that certain real estate was conveyed to it by said Metcalf; but it denies all the other allegations contained in said paragraph.

17 4. This defendant admits that some of its stockholders are stockholders in the Ludlow Manufacturing Company, but it denies that said companies have common interests or that they are under a common management.

This defendant admits that it purchased for its own use certain real estate from said Metcalf including that conveyed by the plaintiff to said Metcalf, and other land owned by him, but it denies that said purchase was made for the common benefit of the Ludlow Manufacturing Company and itself.

This defendant denies that at the time of said purchase it had notice of the agreement referred to in plaintiff's bill, and it denies that said agreement created or established any easements, restrictions or encumbrances upon the land conveyed to it or that the conveyance was made to it with any purpose to avoid any such easements, restrictions or encumbrances.

This defendant neither admits nor denies the other allegations contained in said fourth paragraph relating to the purchase by the Ludlow Manufacturing Company — the real estate upon said Chicopee river and to the location of other mills upon said stream, but leaves the plaintiff to prove the same so far as it may deem them material.

5. This defendant neither admits nor denies the allegations contained in the fifth paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

BROOKS & HAMILTON,
CARROLL & McCLINTOCK,
Def't's Att'ys.

Filed 8 Nov. 1901.

18 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

Between—

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,
and
THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW CORDAGE Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Plaintiff's Motion to Amend Bill of Complaint.

And now comes the plaintiff and moves to amend its bill of complaint in the above entitled suit so that the first paragraph thereof will read as follows:—

"The plaintiff owns in fee and is the occupant of a certain mill site with two water mills, to wit—a cotton mill and a power mill thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit—the Chicopee river, and is entitled to use for working said mills the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of said power and privilege for the aforesaid purpose of working said mills is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston and Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield

19 road; and on the west by land of Honorah Dunn and land the record title to which stands in the name of the Ludlow Cordage Company. The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition in 1900 and 1901, of some land above the same, by the erection of said power mill and the installation therein of proper machinery to generate, by said water power, electrical power and to transmit the electrical power so generated to said cotton mill which was in excess of two hundred and fifty — dollars ($250,000.) including the cost of said

machinery and building, which was in excess of fifteen thousand dollars ($15,000)."

And to amend the second paragraph of said bill of complaint by substituting the word "mills" for the word "mill" in the sixth line and also in the last line of said paragraph.

And to amend the fifth paragraph of said bill by striking out the first 24 lines thereof and inserting in place thereof the following to wit:

"The Ludlow Manufacturing Company is building a dam on said "A" which is nearly completed and which when completed and when its gates are closed will raise the waters of said stream upon said mill site of the plaintiff more than twelve feet higher than said bolts, and will flood the plaintiff's mill site and will cause a back water which will flow out and destroy said mill privileges and power developed by the plaintiff as aforesaid, and will in part shut down said mills of the plaintiff and the machinery thereof, and will flood said power mill and the machinery therein placed by the plaintiff as aforesaid, and will cause the plaintiff irreparable injury. Said dam is being erected by said defendants to an unreasonable and unnecessary height to develope a water power far in excess of any reasonable or lawful needs or requirements of the defendants. The water power of the stream is sufficient for the lawful and reasonable uses and requirements of the plaintiff and the defendants; but the defendants have erected said dam as aforesaid for the purpose of preventing the plaintiff's enjoying the lawful necessary and reasonable use of the waters of said stream and of the water power and privilege developed by the plaintiff as aforesaid."

And to further amend said fifth paragraph by substituting the word "mills" for the word "mill" in the 30th, 35th, and 44th lines of said paragraph, and by striking out the word "said" and substituting therefor the word "the" in the 47th line of said paragraph.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

MAY 20, 1902.

Then personally appeared George F. Fabyan of Brookline in the county of Norfolk, and Commonwealth of Massachusetts, treasurer of The Otis Company the above named plaintiff, and being duly sworn on oath deposes and says as follows:—"The facts and circumstances stated in this motion in relation to the first and second paragraphs of the bill of complaint are true and within my own personal knowledge, and the facts and circumstances stated in the above motion in reference to the fifth paragraph are believed by me to be true."

Before me

FREDERICK P. CABOT,
Justice of the Peace.

May 21, 1902.—Amendment allowed by consent.

21 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss.:

Superior Court. In Equity.

Between—

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,

and

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW Cordage Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Plaintiff's Amended Bill of Complaint.

1. The plaintiff owns in fee and is the occupant of a certain mill site with two water mills, to wit;—a cotton mill and a power mill thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit;—the Chicopee river, and is entitled to use for working said mills the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of said power and privilege for the aforesaid purpose of working said mills is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston & Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield road; and on the west by land of Honorah Dunn and land the

22 record title to which stands in the name of the Ludlow Cordage Company.

The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition in 1900 and 1901 of some land above the same, by the erection of said power mill and the installation therein of proper machinery to generate, by said water power, electrical power and to transmit the electrical power so generated to said cotton mill, was in excess of two hundred and fifty thousand dollars ($250,000.) including the cost of said machinery and building, which was in excess of fifteen thousand dollars ($15,000).

2. The development of said water power and privilege by the construction of said dam was completed on the 25th day of April 1901; and on the 26th day of said April the plaintiff commenced to use and has since, with only slight interruptions, continuously used said water power and privilege for the purpose of working its aforesaid mills.

Said dam was not erected to the injury of any mill either above or below it on the same stream, nor to the injury of any mill site on

the same stream on which a mill or mill dam had been lawfully erected and used, nor to the injury of any such mill site which had been occupied as such by the owner thereof; and the use of said dam and of said water power and privilege for the present and future working of said mills is a reasonable and necessary one.

3. On the 26th day of September A. D. 1882, the plaintiff was the owner of a portion of said mill site and one Edwin D. Metcalf was the owner of another portion of said mill site and also of other land adjoining the same and bordering on said stream; and thereupon the said Metcalf and the plaintiff entered into an agreement in writing of the tenor following, that is to say,—

23 Memorandum of Agreement Between the Otis Company and Edwin D. Metcalf.

Sept. 26, 1882.

Agreement made this 26th day of Sept., 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business at Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Mass., both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

1st. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river, and extending back therefrom, situate in said Palmer, and known as the Shearer property as soon as reasonably may be, and at such price as the parties hereto may mutually agree upon.

2nd. As soon as said real estate is so purchased, said company agrees to convey to said Metcalf in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

3rd. Said Metcalf agrees to then convey to said company in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river which lies above a point in range with said stake.

4th. Both parties hereto will aid in all reasonable ways in the consummation of said purchase of said Shearer property, and not in any unreasonable manner to do anything to interfere with such purchase, and said property and no part thereof shall be purchased by either of said parties, or anyone in their behalf except in pursuance of this agreement.

24 5th. Until such purchase shall be consummated all work in the way of developing and improving their respective water powers on said river below Three Rivers shall be wholly suspended by the parties hereto.

6th. Said Metcalf or his assignees shall not construct a dam in the development of his or their power, which shall afford more than

21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its, or their power, which shall afford more than 19 65/100 feet fall, or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

7th. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto, unless said company shall fail to purchase said Shearer property, within six months from the date hereof, but in the event of such failure these presents shall become null and void, at the expiration of said period, and whatever rights, if any, under the mill act or otherwise, either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consummated as hereinbefore provided.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D. METCALF.

And thereafter, to wit;—on the 31st day of October 1882, the plaintiff purchased the Shearer property referred to in said agreement; and thereupon said Metcalf conveyed to the plaintiff all that portion of the Green property owned by him situated on the northerly side of said river and lying above a point in range with the stake referred to in the 3rd article of said agreement; and the plaintiff conveyed to said Metcalf all that portion of said Shearer property which was situated below said stake referred to in the 2nd article of said agreement. And at the time said conveyances from Metcalf to the plaintiff and from the plaintiff to Metcalf were made, the plaintiff and Metcalf, by bolts driven into rocks in said river, marked and indicated the extreme height to which said Metcalf or his assigns could raise the waters of said river by constructing a dam in the development of his or their power under the 6th article of said agreement. The land conveyed by said Metcalf to the plaintiff is a part of the plaintiff's said mill site; and the land conveyed by the plaintiff to said Metcalf together with said lands theretofore owned by him constituted a mill site or privilege capable of development into water power by said Metcalf or his assigns, was subject to the 6th article of said agreement, and was thereafter conveyed by said Metcalf to the Ludlow Cordage Company as hereinafter recited.

4. The defendant The Ludlow Cordage Company was organized in part by stockholders of the Ludlow Manufacturing Company. The two corporations have common interests and are in some respects under a common management. The defendant corporations, for their common benefit and for their common use, purchased of said Metcalf said land conveyed to him by the plaintiff as aforesaid, as well as said other lands owned by him, and, for their common benefit as well as to avoid the easements, restrictions and incumbrances upon the land so conveyed created by said 6th article of said agreement, had the title to said lands conveyed by said Metcalf to said

Ludlow Cordage Company. The defendant corporations made said purchase, paid said Metcalf therefor, and took said conveyance with knowledge and notice of said agreement and of the aforesaid
26 incumbrances, conditions and restrictions thereby created.

The Ludlow Manufacturing Company, at or about the time of said conveyance to said Ludlow Cordage Company from said Metcalf acquired title to certain other parcels of land on said Chicopee river lying below the premises conveyed to the Ludlow Cordage Company by Metcalf as aforesaid, and extending on the banks of the stream more than half a mile. These parcels of land, for convenience, are hereinafter called "A." Some miles below "A" on said stream but separated from "A" by mill sites and water mills belonging to strangers to this suit, are mills belonging to the Ludlow Manufacturing Company, some of which are operated by it and some of which are operated by the Ludlow Cordage Company.

5. The Ludlow Manufacturing Company is building a dam on said "A," which is nearly completed and which when completed and when its gates are closed will raise the waters of said stream upon said mill site of the plaintiff more than twelve feet higher than said bolts, and will flood the plaintiff's mill site and will cause a back water which will flow out and destroy said mill privileges and power developed by the plaintiff as aforesaid, and will in part shut down said mills of the plaintiff and the machinery thereof, and will flood said power mill and the machinery therein placed by the plaintiff as aforesaid, and will cause the plaintiff irreparable injury. Said dam is being erected by said defendants to an unreasonable and unnecessary height to develop a water power far in excess of any reasonable or lawful needs or requirements of the defendants. The water power of the stream is sufficient for the lawful and reasonable uses and requirements of the plaintiff and the defendants; but the defendants have erected said dam as aforesaid for the purpose of preventing the plaintiff's enjoying the lawful, necessary and
27 reasonable use of the waters of said stream and of the water power and privileges developed by the plaintiff as aforesaid.

Unless the defendants are restrained by the order of this court they will forthwith close the gates of said dam and raise the waters of said stream to the aforesaid unreasonable height of more than twelve feet above said bolts and create said back water and flow out and destroy the plaintiff's aforesaid water power and privilege, and shut down its mills and flood and injure its buildings and machinery and cause it irreparable damage and injury as aforesaid.

The plaintiff prays that the defendants and their officers, agents and servants may be perpetually enjoined from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out or injuring or destroying said mill privilege and water power of the plaintiff so developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by the defendants' said dam or otherwise, and

that in the meantime, until the further order of this honorable court, the defendants and their officers, agents and servants be restrained by the order and injunction of this court from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out, injuring or destroying said mill privilege and water power of the plaintiff developed as aforesaid, and from injuring or interfering with the building and machinery of the plaintiff by backing and holding back the waters of said stream by said dam of the defendants or otherwise.

28 I, George F. Fabyan of Brookline in the county of Norfolk, and Commonwealth of Massachusetts, treasurer of The Otis Company the above named plaintiff, on oath depose and say as follows;

The facts and circumstances stated in the first and second paragraphs of the foregoing amended bill of complaint are true and within my own personal knowledge. The facts and circumstances stated in the third, fourth and fifth paragraphs of said amended bill are believed by me to be true from information which I have received from others.

GEORGE F. FABYAN.

Before me,

FREDERICK P. CABOT,
Justice of the Peace.

May 20, 1902.

[Endorsed:] 569 Eq. Otis Company vs. Ludlow Mfg. Co. & *al.* Plaintiff's amended bill of complaint.

29 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Manufacturing Company to Plaintiff's Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant denies the allegations contained in the second paragraph of plaintiff's bill, and on the contrary avers that prior to

any act of the plaintiff this defendant had made an appropriation of the undeveloped power of said river to the extent which would be afforded by its dam about to be constructed, had adopted a well defined plan therefor, had duly filed plans and specifications of its proposed work with the county commissioners of the county of *of* Hampden, had occupied its mill site as such, had commenced the erection of said dam and other structures appurtenant thereto, and has ever since continuously and with reasonable despatch proceeded with its said work intending to put in operation a mill, for the working of which the water of said river is to be applied.

30 3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in said third paragraph, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Cordage Company, but denies that said companies have common interests or that they are under a common management.

This defendant admits that the Ludlow Cordage Company purchased certain real estate from said Metcalf, but whether it included that conveyed by the plaintiff to said Metcalf this defendant neither admits nor denied, but leaves the plaintiff to prove the same so far as it may be deemed material.

All the other allegations contained in the fourth paragraph of plaintiff's bill relating to the purchase of said Metcalf's land this defendant denies, and it denies that it had any notice of the agreement referred to in plaintiff's bill or of the terms thereof.

This defendant admits that at or about the time of the conveyance to the Ludlow Cordage Company of the Metcalf land it acquired title to certain parcels of land on said Chicopee river lying below the premises conveyed to said Ludlow Cordage Company, but whether these parcels are identical with those designated in plaintiff's bill as "A" this defendant can neither admit nor deny, but leaves it to be hereafter explained.

31 Further answering, this defendant avers that long prior to said conveyance by said Metcalf to said Ludlow Cordage Company, it had acquired from time to time sundry parcels of land including that upon which its dam is now erected and that all of said purchases were in connection with its plan then already conceived and determine- to erect its said dam. This defendant's dam is located nearly two miles below the plaintiff's property.

This defendant admits that some distance below its said dam there is a water mill belonging to a stranger to this suit and below this last mentioned mill are mills of this defendant, a portion of the

floor of one of said mills being used and occupied by the Ludlow Cordage Company as lessee.

5. If by the description "A" plaintiff refers to lands purchased by this defendant at or about the time of the conveyance by said Metcalf to said Ludlow Cordage Company, this defendant denies that it is building a dam on such land, but it admits that it has been engaged in building a dam on property acquired by it in or about the year 1891 for the purpose of working its mills and for other purposes reasonable incident to its property, and said dam is now completed, and that since commencing its occupation as aforesaid this defendant has completed and put in operation a mill for the working of which the water of said stream is applied.

This defendant denies the allegation that its said dam is being constructed to an unreasonable and unnecessary height or with any purpose to prevent the plaintiff's enjoyment of its property, except so far as may inevitable result, but on the contrary this defendant avers that all the power to be generated by said dam is reason-
32 able required by it in the operation and legitimate development of its mills and mill property.

All other allegations contained in the fifth paragraph of plaintiff's bill this defendant denies.

6. This defendant avers further that at the time the plaintiff commenced work upon its property it knew that the defendant was then and for some time had been proceeding with the erection of its dam and knew the extent to which the same when completed would set back the waters of said river, but notwithstanding this knowledge the plaintiff took no steps to protect its rights but proceeded with its work in utter disregard of the consequences, and the defendant avers that the plaintiff being at the outset and at all times since in a position to have determined the legal rights of the parties and failing to do so has been guilty of laches and is not entitled to the relief prayed for.

By Def't's Att'ys, WALTER S. ROBINSON.
JAS. B. CARROLL.
WM. H. BROOKS.

May 24, 1902.—Answer filed by consent.

33 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss.:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Answer of Defendant Ludlow Cordage Company to Plaintiff's Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant neither admits nor denies the allegations contained in the second paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September 1882 and to the agreement set forth in the third paragraph of the plaintiff's bill, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant admits that certain real estate was conveyed to it by said Metcalf; but it denies all the other allegations contained in said paragraph.

34 4. This defendant admits that some of its stockholders are stockholders in the Ludlow Manufacturing Company, but it denies that said companies have common interests or that they are under a common management.

This defendant admits that it purchased for its own use certain real estate from said Metcalf including that conveyed by the plaintiff to said Metcalf, and other land owned by him, but it denies that said purchase was made for the common benefit of the Ludlow Manufacturing Company and itself.

This defendant denies that at the time of said purchase it had notice of the agreement referred to in plaintiff's bill, and it denies that said agreement created or established any easements, restrictions or encumbrances upon the land conveyed to it or that the conveyance was made to it with any purpose to avoid any such easements, restrictions or encumbrances.

This defendant neither admits nor denies the other allegations contained in said fourth paragraph relating to the purchase by the Ludlow Manufacturing Company of the real estate upon said Chicopee river and to the location of other mills upon said stream, but

leaves the plaintiff to prove the same so far as it may deem them material.

5. This defendant neither admits nor denies the allegations contained in the fifth paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same as far as it may deem them material.

By Def't's Att'ys, WALTER S. ROBINSON,
JAS. B. CARROLL,
WM. H. BROOKS.

Filed by consent May 24, 1902.

35 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk, }

Superior Court. In Equity.

Between

THE OTIS COMPANY, a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in Boston, in said County, Plaintiff,

and

THE LUDLOW MANUFACTURING COMPANY and THE LUDLOW Cordage Company, Each of Which is a Manufacturing Corporation Organized under the Laws of said Commonwealth and Having a Usual Place of Business in said Boston, Defendants.

Plaintiff's Amended Bill of Complaint.

1. The plaintiff owns in fee and is the occupant of a certain mill site with two water mills, to wit, a cotton mill and a power mill thereon, situated in Palmer in the county of Hampden in said Commonwealth, on a mill stream, to wit, the Chicopee river, and is entitled for use for working said mills the water power and privilege which it has developed at said site by a dam erected thereon and across said river in the years 1900 and 1901; and the use of
36 said power and privilege for the aforesaid purpose of working said mills is a reasonable and necessary use.

Said mill site is bounded on the north by the tracks and by land occupied by the Boston & Albany Railroad Company; on the east by the highway to Belchertown; on the south by Springfield road; and on the west by land of Honorah Dunn and land the record title to which stands in the name of the Ludlow Cordage Company.

The cost of developing said water power and privilege by the erection of the aforesaid dam, by the acquisition, in 1900 and 1901, of some land above the same, by the erection of said power mill and the installation therein of proper machinery to generate, by said water power, electrical power and to transmit the electrical power so generated to said cotton mill, was in excess of two hundred and fifty thousand dollars ($250,000), including the cost of said machinery

and building, which was in excess of fifteen thousand dollars ($15,000).

2. The development of said water power and privilege by the construction of said dam was completed on the 25th day of April, 1901; and on the 26th day of said April, the plaintiff commenced to use and has since, with only slight interruptions, continuously used and is now using said water power and privilege for the purpose of working its aforesaid mills.

Said dam was not erected to the injury of any mill either above or below it on the same stream, nor to the injury of any mill site on the same stream on which a mill or mill dam had been lawfully erected and used, nor to the injury of any such mill site which had been occupied as such by the owner thereof; and the use of said dam and of said water power and privilege for the present and future working of said mills is a reasonable and necessary one.

3. On the 26th day of September, A. D. 1882, the plaintiff was the owner of a portion of said mill site and one Edwin D. Metcalf was the owner of another portion of said mill site and also of other land adjoining the same and bordering on said stream; and thereupon the said Metcalf and the plaintiff entered into an agreement, in writing, of the tenor following, that is to say—

Memorandum of Agreement between the Otis Company and Edwin D. Metcalf, September 26, 1882.

Agreement made this 26th day of September, 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business at Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Mass., both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

37 1st. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river, and extending back therefrom, situate in said Palmer, and known as the Shearer property, as soon as reasonably may be, and at such price as the parties hereto may mutually agree upon.

2d. As soon as said real estate is so purchased, said company agrees to convey to said Metcalf, in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

3d. Said Metcalf agrees to then convey to said company, in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river, which lies above a point in range with said stake.

4th. Both parties hereto will aid in all reasonable ways in the consummation of said purchase of said Shearer property, and not in any unreasonable manner do anything to interfere with such purchase, and said property and no part thereof shall be purchased by

either of said parties, or anyone in their behalf, except in pursuance of this agreement.

5th. Until such purchase shall be consummated, all work in the way of developing and improving their respective water powers on said river below Three Rivers shall be wholly suspended by the parties hereto.

6th. Said Metcalf or his assignees shall not construct a dam in the development of his or their power which shall afford more than 21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its or their power which shall afford more than 19 65/100 feet fall, or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

7th. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto, unless said company shall fail to purchase said Shearer property within six months from the date hereof, but in the event of such failure these presents shall become null and void at the expiration of said period, and whatever rights, if any, under the mill act or otherwise, either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consummated as hereinbefore provided.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D. METCALF.

And thereafter, to wit, on the 31st day of October, 1882, the plaintiff purchased the Shearer property referred to in said agreement; and thereupon said Metcalf conveyed to the plaintiff all said portion of the Green property owned by him situated on said
38 opposite side of said river and lying above a point in range with the stake referred to in the 3d article of said agreement; and the plaintiff conveyed to said Metcalf all that portion of said Shearer property which was situated below said stake referred to in the 2d article of said agreement. At the time said conveyances from Metcalf to the plaintiff and from the plaintiff to Metcalf were made, the plaintiff and Metcalf, by bolts driven into rocks in said river, marked and indicated the extreme height to which said Metcalf or his assigns could raise the waters of said river by constructing a dam in the development of his or their power under the 6th article of said agreement. The land conveyed by said Metcalf to the plaintiff is a part of the plaintiff's said mill site; and the land conveyed by the plaintiff to said Metcalf, together with said lands theretofore owned by him, constituted a mill site or privilege capable of development into water power by said Metcalf or his assigns, was subject to the 6th article of said agreement, and was thereafter conveyed by said Metcalf to the Ludlow Cordage Company as hereinafter recited. Said agreement has never been violated nor annulled.

4. The defendant, The Ludlow Cordage Company, was organized in part by the stockholders of the Ludlow Manufacturing Company,

and the two corporations heretofore have been and now are under common management. On or about the 21st of November, A. D. 1898, the Ludlow Manufacturing Company purchased of said Metcalf said land theretofore conveyed to him by the plaintiff and said other land of said Metcalf, excepting that conveyed by him to the plaintiff as aforesaid, and thereafter, to wit, on or about the third day of December, A. D. 1898, the Ludlow Manufacturing Company paid said Metcalf the purchase price for said land, to wit, fifteen thousand dollars ($15,000), and took a quit-claim deed thereof from said Metcalf to the Ludlow Cordage Company. The Ludlow Manufacturing Company made said purchase and payment and took said deed in the name of the Ludlow Cordage Company, with knowledge of said agreement between Metcalf and the plaintiff and with knowledge that neither said Metcalf nor his assigns had any right to construct a dam in the development of the water power of said river which would develop more than 21 32/100 feet fall on the land so purchased by the Ludlow Manufacturing Company, or which would raise the water of said river to a greater height than said copper bolt.

The Ludlow Manufacturing Company purchased said land for its own purposes, paid for it with its own funds, and, by virtue of the transactions herein recited, is the legal and equitable owner of the land so purchased, enjoying and exercising full control over the same. It took said deed in the name of the Ludlow Cordage Company, in order to conceal the true ownership of said land and have it appear that the Ludlow Manufacturing Company was not in law or in equity the owner of said premises, and was not in law or equity an assign of said Metcalf, and was not in law or
39 equity bound by the aforesaid covenants, agreements and restrictions created in favor of the plaintiff by the aforesaid agreement between the plaintiff and said Metcalf.

The Ludlow Manufacturing Company, at or about the time of said purchase from said Metcalf by it, acquired title by deeds to other parcels of land and flowage rights on said Chicopee river, extending from said premises so purchased by it from Metcalf to the site of its dam hereinafter referred to, which site is hereinafter called "A."

Some miles below "A" on said stream, separated from A by mill sites and water mills belonging to strangers to this suit, are mills belonging to and operated by the Ludlow Manufacturing Company, and a floor of one of said mills is used by the Ludlow Cordage Company.

5. The Ludlow Manufacturing Company is building a dam on said "A," in the development of the water power of said river on the land so purchased by the Ludlow Manufacturing Company of Metcalf and conveyed by said Metcalf as aforesaid, which is nearly completed and which, when completed, will afford much more than 21 32/100 feet fall on said land so purchased and conveyed, and will raise the waters of said stream upon the land so purchased and conveyed, as well as upon the aforesaid land of the plaintiff to the

plaintiff conveyed by said Metcalf as aforesaid, much more than 12 feet higher than said copper bolt, and which, by reason of creating the aforesaid excess of fall and by reason of raising the water to the aforesaid excessive height, will flood the plaintiff's mill site and will cause a back water which will flow out and destroy said mill power and privilege developed by the plaintiff as aforesaid, will interfere with the operation of the plaintiff's water wheels in said power mill, and will flood said power mill and the machinery and wheels therein placed by the plaintiff as aforesaid, and will cause the plaintiff irreparable injury.

Said dam is being erected by said defendants to an unreasonable and unnecessary height to develop a water power far in excess of any reasonable or lawful needs or requirements of the defendants. The water power of the stream is sufficient for the lawful and reasonable uses and requirements of the plaintiff and the defendants; but the defendants have erected said dam as aforesaid for the purpose of preventing the plaintiff's enjoying the lawful, necessary and reasonable use of the waters of said stream and of the water power and privilege developed by the plaintiff as aforesaid.

6. The Ludlow Manufacturing Company claims that before the plaintiff, by surveying or otherwise, entered upon the work preliminary to building the plaintiff's dam, or before the plaintiff began to construct said dam, the Ludlow Manufacturing Company commenced on its said mill site the work preliminary to constructing its dam, and also the work of excavating for the erection of its dam, and that, by said preliminary work and by excavating so commenced as aforesaid, the Ludlow Manufacturing Company, under sections 1 and 2 of chapter 190 of the Public Statutes of Massachusetts (Rev. Laws, chap. 196, §§ 1, 2), acquired the right to erect its said dam, now in process of building, as aforesaid, to a height of fifty-one feet, and thereby raise the waters of said stream fifty-one feet above the usual and ordinary height thereof; and to thereby afford and develop more than 21 32/100 feet fall on said land so purchased by the Ludlow Manufacturing Company of said Metcalf as aforesaid; and to thereby raise the waters of said stream on said land purchased from Metcalf much more than twelve feet higher than said copper bolt; and to thereby flow said mill site of the plaintiff, including said land conveyed to it by said Metcalf; and to thereby raise the waters of said stream on said land of the plaintiff, including that conveyed to the plaintiff by Metcalf, greatly in excess of the usual and ordinary height thereof, so that the plaintiff will not have the 19 65/100 feet of fall provided for by the sixth article of said agreement and so that said waters will flood the natural banks of said stream on the plaintiff's land, flood the plaintiff's mill site and flow out and destroy the power mill, the mill privilege and water power developed by the plaintiff as aforesaid.

If said dam of the Ludlow Manufacturing Company, in process of construction as aforesaid in the development of its said power, be so constructed that it will not afford more than 21 32/100 feet fall

on said land so purchased by the Ludlow Manufacturing Company of said Metcalf as aforesaid, the waters of said stream will not be raised higher than said copper bolt, said mill site of the plaintiff and said land conveyed to it by said Metcalf as aforesaid will not be flowed, the waters of said stream thereon will not be raised above the usual and ordinary height thereof and said mill site of the plaintiff and said mill privilege and water power developed by the plaintiff as aforesaid will not be flowed out or in any way injured or affected.

7. The plaintiff denies that the Ludlow Manufacturing Company began said preliminary work and said work of constructing said dam as aforesaid before the plaintiff began the work of construction of its said dam as aforesaid, and denies that the Ludlow Manufacturing Company commenced the occupation as a mill site of its said mill site before the plaintiff began the occupation as a mill site of its said mill site and of said land conveyed to it by Metcalf as aforesaid; and the plaintiff says that the Ludlow Manufacturing Company has not yet completed the erection of its said dam or raised the waters of said stream thereby or flooded the plaintiff's land or in any way interfered with the operation of said mill of the plaintiff or the use or enjoyment of the plaintiff of its aforesaid water power development and power mill.

8. Said sections 1 and 2 of chapter 190 of the Public Statutes of Massachusetts (Rev. Laws, chap. 196, sects. 1 and 2) are as follows:—

41 "SECTION 1. A person may, as hereinafter provided, erect and maintain a water mill and a dam to raise water for working it, upon and across any stream not navigable.

"SECTION 2. Such dam shall not be erected to the injury of a mill lawfully existing above or below it on the same stream, nor to the injury of a mill site on the same stream on which a mill or mill dam has lawfully been erected and used, unless the right to maintain a mill on such last-mentioned site has been lost by abandonment or otherwise; nor shall a mill dam be erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof, if, within a reasonable time after commencing such occupation he completes and puts in operation a mill for the working of which the water of such stream is applied; nor shall a mill or dam be placed on the land of any person without such grant, conveyance or authority from the owner as would be necessary to convey land."

There are no provisions in said chapters nor in the statutes of this Commonwealth for notice to riparian proprietors or land owners of the intention of another person to erect a dam which will flow or injure the land or property of such riparian proprietor or land owner. The plaintiff, before it commenced the construction of its said dam and the occupation as a mill site of its mill site and of said land conveyed to it by Metcalf as aforesaid, had no notice or knowledge that the Ludlow Manufacturing Company, or any other person,

intended to erect a dam which would flow said mill site of the plaintiff, or which would flow said land conveyed to the plaintiff by said Metcalf as aforesaid, or which would flow out, interfere with or destroy said power mill or the mill privilege and water power developed by the plaintiff as aforesaid.

9. If it is the intention and meaning of said statutes hereinbefore recited that a riparian proprietor can, by commencing to occupy his mill site as such or by commencing the work preliminary to the erection of a dam thereon or by commencing to erect such dam, thereby acquire the right to flow out and injure a mill site belonging to an upper riparian proprietor on the same stream and in actual occupation as such, and the water power thereon developed, and a water mill thereon completed, in actual use and worked by said water power, then the plaintiff says that said statutes are in violation of the fifth and fourteenth amendments of the Constitution of the United States and of the constitution of Massachusetts.

Unless the defendants are restrained by the order of this court they will forthwith, in violation of the plaintiff's rights both as a property owner and as a party to said agreement, complete said dam, close the gates thereof and raise the waters of said stream, create said back water and flow out and destroy the plaintiff's aforesaid mill site, water power and privilege, and shut down its mills, and flood and injure its buildings and machinery, and cause it irreparable damage and injury as aforesaid.

The plaintiff prays that the defendants and their officers, agents and servants may be perpetually enjoined from flooding the
42 plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out or injuring or destroying said mill privilege and water power of the plaintiff so developed as aforesaid, and from injuring or interfering with said building and machinery of the plaintiff by backing and holding back the waters of said stream by the defendants' said dam or otherwise, and that in the meantime, until the further order of this honorable court, the defendants and their officers, agents and servants be restrained by the order and injunction of this court from flooding the plaintiff's said mill site, backing the waters of said stream upon the plaintiff's said mills and said site, flowing out, injuring or destroying said mill privilege and water power of the plaintiff developed as aforesaid, and from injuring or interfering with the building and machinery of the plaintiff by backing and holding back the waters of said stream by said dam of the defendants or otherwise.

By BOYD B. JONES,
Plaintiff's Solicitor.

Filed by consent Dec. 7, 1903.

Answer of Defendant Ludlow Cordage Company to Plaintiff's Second Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

2. This defendant neither admits nor denies the allegations contained in the second paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff in September, 1882, and to the agreement set forth in the third paragraph of the plaintiff's bill, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant admits that certain real estate was conveyed to it by said Metcalf; but it denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Manufacturing Company, but it denies that said companies have common interests or that they are under a common management. This defendant admits that it purchased for its own use certain real estate from said Metcalf, including
43 that conveyed by the plaintiff to said Metcalf and other land owned by him; and that the purchase price for said land was $15,000, which it paid to said Metcalf.

This defendant denies all the other allegations contained in said 4th paragraph.

5. This defendant neither admits nor denies the allegations contained in the 5th paragraph of the plaintiff's bill, but leaves the plaintiff to prove the same so far as it may deem them material.

6. This defendant demurs to the 6th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same so far as it may deem them material.

7. This defendant demurs to the 7th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same, so far as it may deem them material.

8. This plaintiff demurs to the 8th paragraph of the plaintiff's

bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same so far as it may deem them material.

9. This defendant demurs to the 9th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite the facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading. As to the facts stated in said paragraph this defendant, without waiving its demurrer, neither admits nor denies, but leaves the plaintiff to prove the same so far as it may deem them material.

LUDLOW CORDAGE CO.,
By WILLIAM H. BROOKS,
JAMES B. CARROLL,
WALTER S. ROBINSON,
Its Attorneys.

Filed by consent Dec. 7, 1903.

44 Answer of Defendant Ludlow Manufacturing Company to Plaintiff's Second Amended Bill.

1. This defendant denies the allegations contained in the first paragraph of the plaintiff's bill, except that relating to expenditures made by the plaintiff, which allegation this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as they may be deemed material.

2. This defendant denies the allegations contained in the second paragraph of the plaintiff's bill, and, on the contrary, avers that, prior to any act of the plaintiff, this defendant had made an appropriation of the undeveloped power of said river to the extent which would be afforded by its dam about to be constructed, had adopted a well-defined plan therefor, had duly filed plans and specifications of its proposed work with the county commissioners of the county of Hampden, had occupied its mill site as such, had commenced the erection of said dam and other structures appurtenant thereto, and has ever since, continuously and with reasonable despatch, proceeded with its said work, intending to put in operation a mill, for the working of which the water of said river is to be applied.

3. This defendant neither admits nor denies the allegations contained in the third paragraph of the plaintiff's bill relating to the ownership of lands on said stream by said Metcalf and the plaintiff, in September, 1882, and to the agreement set forth in said third paragraph, but avers that if any such agreement exists it has no effect or application in the premises.

Further answering, this defendant denies all the other allegations contained in said paragraph.

4. This defendant admits that some of its stockholders are stockholders in the Ludlow Cordage Company, but denies that said companies have common interests or that they are under a common management.

This defendant admits that on or about the third day of December, 1898, certain lands were conveyed by Metcalf, by a quitclaim deed, to the Ludlow Cordage Company, and that the purchase price for said land was $15,000; but whether such conveyance included land conveyed by the plaintiff to Metcalf, this defendant neither admits nor denies, but leaves the plaintiff to prove the same so far as it may be deemed material.

This defendant denies that at or about the time of said conveyance from Metcalf to the Ludlow Cordage Company it acquired title by deeds to other parcels of land and flowage rights on said Chicopee river, extending from said Metcalf land to the site of defendant's dam; but it admits that in the year 1899 it made several purchases of land along said Chicopee river below said Metcalf land.

45 This defendant admits that at some distance below its said dam there is a water mill belonging to a stranger to this suit, and below this last-mentioned mill are mills of this defendant, a portion of the floor of one of said mills being used and occupied by the Ludlow Cordage Company as lessee.

All the other allegations contained in the 4th paragraph of the plaintiff's bill this defendant denies.

Further answering, this defendant avers that long prior to said conveyance by said Metcalf to said Ludlow Cordage Company it had acquired from time to time sundry parcels of land, including that purchased in the year 1891, upon which its dam is now erected, and that all of said purchases were in connection with its plan, then already conceived and determined, to erect its said dam. This defendant's dam is located nearly two miles below the plaintiff's property.

5. This defendant admits that it has been engaged in building a dam and other structures on the property acquired by it, in and about the year 1891, for the purpose of working its mills and for other purposes reasonably incident to its property, and said dam is now completed; and that since its said appropriation and occupation as aforesaid, this defendant has completed and put in operation a mill for the working of which the water of said stream is applied.

All other allegations contained in said 5th paragraph this defendant denies.

6. This defendant demurs to the 6th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action; but on the contrary purports to set out the defendant's contention; all of which is contrary to the rules of pleading. Without waiving its rights under its demurrer, this defendant denies that said paragraph correctly states its contention, but leaves the plaintiff to prove

the allegations therein contained, so far as it may deem them material.

7. This defendant demurs to the 7th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading.

Without waiving its rights under its demurrer this defendant avers that it had made its appropriation and occupation, as hereinbefore stated, and had completed all preliminary work and had begun the work of constructing said dam, as aforesaid, before the plaintiff began the work of construction of its said dam, as aforesaid, and further avers that it commenced the occupation as a mill site of its said mill site before the plaintiff began the occupation as a mill site of its said alleged mill site and of the land conveyed to it by Metcalf, as aforesaid.

All the other allegations contained in said 7th paragraph this defendant denies.

46 8. This defendant demurs to the 8th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading.

Without waiving its rights under its demurrer, this defendant denies all the other allegations contained in said 8th paragraph.

9. This defendant demurs to the 9th paragraph of the plaintiff's bill for the reason that the same is argumentative and does not recite facts essential to a proper statement of the plaintiff's cause of action, all of which is contrary to the rules of pleading.

Without waiving its rights under its demurrer this defendant denies that it does or will violate any of the plaintiff's legal rights by the erection of its said dam.

10. This defendant avers further, that at the time the plaintiff commenced work upon its property it knew that the defendant was then, and for some time had been, proceeding with the erection of its dam and knew the extent to which the same, when completed, would set back the waters of said river; but notwithstanding this knowledge the plaintiff took no steps to protect its rights, but proceeded with its work in utter disregard of the consequences; and the defendant avers that the plaintiff being at the outset, and at all times since in a position to have determined the legal rights of the parties, and failing to do so has been guilty of laches and is not entitled to the relief prayed for.

LUDLOW MANUFACTURING CO.,
By WILLIAM H. BROOKS,
JAMES B. CARROLL,
WALTER S. ROBINSON,
Its Attorneys.

Filed by consent Dec. 7, 1903.

Plaintiff's Replication.

The plaintiff joins issue in the answer of each of the defendants.

By Its Solicitors, HURLBURT, JONES & CABOT.

Filed by consent as of Dec. 2, 1903.

Interlocutory Decree.

BRALEY, *J.*:

And now on reading the pleadings in the above case and hearing counsel for the respective parties and on consideration thereof it is ordered and decreed that this cause be and hereby is referred
47 to James R. Dunbar, Esq., of Brookline in the county of Norfolk as special master of this court to hear the parties and their evidence, to find the *the* facts together with his rulings of law and so much of the evidence and offers of proof as he deems necessary for a proper understanding of such rulings, and report the same to this court.

By the court,

HENRY E. BELLEW,
Assistant Clerk.

April 4, 1902.

Master's Report.

Pursuant to the decree to which this is annexed, I met the parties and their counsel, and witnesses, and heard their evidence, and the arguments of the counsel, and now report as follows:—

There were many hearings, and I took a view of the mills and dams of the plaintiff and of the defendant, The Ludlow Manufacturing Company, and of the water privileges connected therewith upon the Chicopee river, including the premises occupied by the Ludlow Cordage Co.

During the progress of the hearings, the defendants and plaintiff signed and submitted to the master the following stipulation and agreement:—

"Stipulation A."

"The parties agree as follows:—

The mean elevation of the crest of the plaintiff's dam as built without the flash board is 278.29 feet; with the present flash board unchanged, the mean elevation of plaintiff's dam as built is 279.29.

If flash boards are used as provided for in the plan of dam which plaintiff has filed with county commissioners of Hampden county, the mean elevation of dam would be 283 feet.

The height of the dam as built, without any flash board, from the top of the apron is 19.29 feet.

The ordinary net working head of water without any flash board is not more than 18.56 feet nor less than 18 feet.

The length of plaintiff's dam is 353 feet including power house. The rollway of plaintiff's dam exclusive of piers is 210 feet.

The dam is built on the plaintiff's land as described in deeds Exhibits 4, 5, 7 and 8 across the Chicopee river, and is three quarters of a mile below the cotton mill of the plaintiff on said river at Three Rivers called the Palmer mill, which latter mill the plaintiff
48 has owned and operated since 1872 by the use of water supplemented since 1891 by steam power.

There is a building on a portion of the above-described land at the dam in question, built during the construction of said dam and in connection therewith, and so constructed that there can be installed therein four similar units of power, only one of which said units of power has in fact been already installed.

The unit of power which has been actually installed as above stated consists of a set of four horizontal Hercules water wheels which can be operated by the water raised by said dam, attached to a common shaft and driving a single generator and exciter. The water discharged from these wheels in their operation is conveyed through draught tubes from the said wheels into the tail race, discharging into said river. All the electrical power which can be generated by means of said unit already installed can be transmitted to and used in working the present machinery in said cotton mill, provided additional motor or motors shall be installed at said mill, and provided the plaintiff shall cease to use at said mill a like amount of other power heretofore used for working it with its then and present machinery equipment. In fact, electrical power generated by means of said unit has been and is now transmitted to and used in working portions of said mill as is hereinafter more particularly stated.

The building aforesaid is so constructed that three similar units of power and generators can be installed therein and power varying up to and not more than 1248 horse-power net on the main shaft of said cotton mill in the months when there is water sufficient to supply the full capacity of all the wheels of said three units under 18 feet head can be generated by said three units under said head and can be used in working the plaintiff's said cotton mill with its present equipment as aforesaid, provided additional motors shall be installed at said mill and provided the plaintiff, if it uses said total of 1248 horse-power, shall cease to use at said mill a like amount of other steam, water and electrical power heretofore used for working said mill with its then and present machinery equipment.

Each of said four units if installed can be operated as aforesaid by water raised by the plaintiff's said dam whenever there is sufficient water for said operation. Said unit already installed is capable of producing 488 horse-power on its water-wheel shaft when there is sufficient water to operate it under a net head of 18 feet at full gate. And each of the other units if installed will produce 488 additional

horse-power on its water-wheel shaft under the same conditions. With a head of 18.56 feet the power developed by each of said units would be increased. The defendant, however, does not admit a head of more than 18 feet.

In the five wettest months of the average year the average
49 total net twenty-four hours' flow is sufficient to operate under a net head of 18 feet said four units, if installed and operated at their full capacity, which capacity is at most 1952 horse-power on the water-wheel shafts.

An increase by flash boards in the head of the same quantity of water at plaintiff's dam would cause a corresponding increase in the water power developed thereby.

The plaintiff's dam with a flash board a foot high and its appurtenances and connections, such as raceways, gates and building for the installation of water wheels and generators, and the transmission lines and all the mechanisms for the full utilization of the power of one of said units, were completed and installed on the 1st day of July, A. D. 1901 (with the exception of additional motor or motors which would be necessary for the full utilization of said power of said unit at said mill), and the waters of said river were then raised by said dam, and one of said units of power capable of producing 488 horse-power on the water wheel shaft, when the water wheels of said unit are operated under a net head of 18 feet, with full gate opening, was then connected with a generator and other electrical apparatus having a capacity under the above conditions, if such additional motor or motors are installed, of 415 electrical horse-power on the main shaft at its said mill, and then on said first day of July, A. D. 1901, and thence to the present time said waters have been continuously held back and kept raised by said dam, and said set of wheels of said unit have been continuously operated by said water power, and said generator and electrical machinery have been continuously driven by said water wheels of said unit, and said electrical power thereby generated has been continuously transmitted to the plaintiff's cotton mill and used in working substantial portions of the plaintiff's said cotton mill to the extent of 350 horse-power, on the motor shaft, excepting Sundays, holidays, nights and also occasions between October 16, 1901, and May 6, 1902, when the waters of said river below the plaintiff's dam were raised and set back by the defendant's dam and the working of said water wheels of the plaintiff, as aforesaid, thereby interfered with. These were occasions of heavy rains when the waste gates of the defendant's dam, which are located at the bottom of the dam, although open, were inadequate to discharge the flow of the river.

In the operation of said water wheels of the defendant installed as hereinafter stated for the production of power, and also in the operation thereof, together with the operation of such additional wheels as may be hereafter installed by the defendant, as hereinafter stated, the defendant's dam will under ordinary conditions so raise the waters of the stream as to materially reduce the head of

water created by the plaintiff's dam, and materially interfere with the working of the water wheels of said unit installed by the plaintiff as aforesaid, and materially diminish the power developed by said wheels of said unit and the electrical power generated by means thereof and used in working said portions of said mills as aforesaid, the amount of such reduction, interference and diminution depending upon the height to which the water is so set back, and so as to materially interfere with the working of the water wheels of said additional three units of power if installed by the plaintiff as aforesaid, and materially diminish the power developed by said wheels of said additional three units and the electrical power which may be generated by means thereof, the amount of such reduction, interference and diminution depending upon the height to which the water is so set back; and so as to cause the waters of said stream to flow a certain portion of the land described in a deed from Edwin D. Metcalf to the Ludlow Cordage Company to be introduced in evidence; and so as to set back the waters of said river on the land described in said deed lying between the westerly boundary of the plaintiff's land below its dam and the westerly boundary of the Sprague lot to an elevation substantially in excess of the elevation of the copper bolt which has been agreed on as 259.73 or 259.86 feet, the amount of such excess depending upon the height to which the water is so set back and being 12.88 feet when said waters are raised to the level of the crest of the defendant's dam; and so as to cause the waters of said stream to flow certain land of the plaintiff which lies below its said dam between said dam and the westerly boundary line of the plaintiff's land, and which was not flowed prior to the erection of the defendant's said dam; (said land which will be so flowed consists of a strip on the northerly side of said river about 100 feet in length and extending along the river and varying in width from 30 feet to 70 feet, and a strip on the southerly side of said river about 115 feet in length along the river and averaging in width about 30 feet).

The first described strip of land is a portion of the tract of land conveyed by said Metcalf to the Otis Company by deed, Exhibit 4, and the second described strip of land is a portion of the tract described in deed from Shearer to the Otis Company, Exhibit 5.

All the plaintiff's dam is built on a portion of each of said tracts excepting that portion which was built on land described in deeds from Honorah Dunn to Otis Company, Exhibits 7 and 8.

At certain times in the year, if the canal gates and waste gates of defendant's dam shall both be open, such reduction, interference and diminution will occur, and, in fact, on occasions hereinafter referred to on and subsequent to March 8, 1902, when the canal gates of such dam have been opened for the purpose of operating the defendant's said mill, and when said mill has been operated by power obtained from the waters raised by its said dam, such reduction, interference and diminution have occurred. The gross head remaining at the plaintiff's dam without flash boards when the water is raised by the

defendant's dam to the level of its crest will be 5.68 feet, but such head can be increased by the use of flash boards on the plaintiff's dam, such increase corresponding to the height of such flash boards.

The plaintiff's dam does not flow any land of the defendant.

51 Ludlow Manufacturing Company's Dam.

Mean elevation of crest of defendant's dam	272.61	feet.
Height of dam from top of apron	51	"
Ordinary net working head of water	50	"
Elevation of bottom of gate opening into canal which feeds the wheels	260.61	"
Length of defendant's dam	880	"
Length of rollway of defendant's dam is	300	"

Defendant's dam is built on land purchased by it in 1891 across the Chicopee river and is about two miles below the plaintiff's dam.

There is a building on a portion of the above-described land built during the construction of the said dam, and in connection therewith, so constructed that there can be installed therein four large similar units of power, two of which units were, in fact, installed in October, 1901, and two smaller similar units of power, one of which was, in fact, installed at the same time that the two units aforesaid were installed. Each of said large units actually installed, as above stated, consists of a set of two main horizontal Hercules water wheels with auxiliary exciter wheels, all of which can be operated by the water when raised by defendant's said dam. The smaller unit installed, as above stated, consists of a set of two smaller horizontal Hercules water wheels.

These three units already installed can be used to drive three generators already installed, from which electrical power can be transmitted to and used in working entire the defendant's new mill hereinafter referred to about four miles below defendant's said dam, which mill requires for its full machinery equipment about 3,000 horse-power for its full operation, and the balance of 179 horse-power can be used to work portions of said defendant's other mills previously erected upon said river about four miles below the said dam, which said other mills have heretofore been operated by water power supplemented by steam power, and in fact said power derived and transmitted from said three units has been so used on and subsequent to March 8, 1902. The amount of said power, however, so actually used at said new mill of the defendant being about 285 horse-power, which was sufficient to operate the then and present machinery equipment of said new mill and the balance 2894 horse-power has been used to operate portions of the said other mills of said defendant, on and subsequent to March 8, 1902. The said balances of power used as aforesaid were in place of a corresponding amount of other power theretofore and now used in operating said

other portions of the defendant's other mills, with their then and present machinery equipment. Provided the defendant shall cease to use at its said other mills the said water power and supplemental steam power heretofore used to operate the then and present machinery equipment thereof, the power derived from the
52 operation of all said six units can be utilized by the defendant for the operation of its said then and present machinery equipment of its said other mills; there being, however, occasions during the wettest months of an average year when the full power that can be derived from said six units will exceed the requirements of the equipment aforesaid, and other occasions during the dryest months of an average year when the power so derived will not be sufficient for the requirements aforesaid. If said other mills of the defendant are fully equipped with machinery, and in full operation, then there will be needed 717 horse-power in addition to the said 3000 horse-power required as aforesaid for said new mill, and also in addition to all other power heretofore and now utilized for the working of said mills of said defendant.

The three units already installed are capable of producing 3740 horse-power on the wheel shafts, or 3179 horse-power on the main shafts, when there is sufficient water to operate them at full head and full gate, and the three additional units will produce a like amount of additional horse-power under the same conditions.

The average total net twenty-four hour flow of the dryest month of the average year with a net head of 50 feet would give at the defendant's dam 1438.95 horse-power on the wheel shafts.

The average total net twenty-four hour flow of the dryest month of the average year if used in ten hours with the same head would give at the defendant's dam 3453.48 horse-power on the wheel shafts.

In the five wettest months of an average year the least net twenty-four hour flow would give at the defendant's dam under a net head of fifty feet at least 5485.80 horse-power on the wheel shafts if all said units were installed.

The Ludlow Manufacturing Company, having become the owner in fee in 1891 of certain land which comprehends the site of its present mill dam, the accompanying development, and the structures hereinafter referred to, employed an engineer, in the spring and summer of 1894, and again in the spring and summer of 1898, to take levels and make surveys, plans and soundings along and upon the property, thus acquired for the purpose of determining whether or not it was practicable to erect a mill dam in the position and upon the site of the mill dam since completed, and immediately after said employment he proceeded to do and did the work comprehended thereby.

Subsequently, in the year 1898, but prior to October, 1898, at the request of the Ludlow Manufacturing Company, the president and the other officials of the Boston & Albany Railroad Company met the officials of the Ludlow Manufacturing Company at Red Bridge,

and there, at the request of the Ludlow Manufacturing Company, determined that the location of the Boston & Albany tracks at that point should be changed so that the erection of a dam at the site of the present so-called Red Bridge dam of the Ludlow Manu-
53 facturing Company should not flood the tracks of said railroad and that said tracks were so changed in accordance with such determination.

The Ludlow Manufacturing Company had then determined to erect a dam on said site, but had not then determined on the height thereof.

In January, 1899, the Ludlow Manufacturing Company employed one Ball, a civil and hydraulic engineer of experience. The contract of said Ball's hiring was as follows, to wit:—

That the Ludlow Manufacturing Company had determined to erect a mill dam at Red Bridge upon the site and the location of the mill dam which was subsequently erected by said company; that he was to proceed immediately to make surveys, cross sections, soundings, plans and estimates necessary for the erection in a completed form on said location of said mill dam, together with raceways, canals, buildings and other structures, and to do such other acts and things as would be necessary for the proper development of the water power on said mill site.

Immediately thereafter, said defendant having determined upon the present height and present site of said dam, said Ball and the agents and employees of the defendant duly authorized, commenced the work of preparation for the building of defendant's said dam and said structures and making said development, and prosecuted said work of preparation for, and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time.

Said mill dam and its appurtenances, said development and said connections, such as raceways, gates and building for installation of water wheels and the genrators and transmission lines, and all the mechanism for the utilization of said power, were completed and installed on and not before October 16, 1901, with the exception of the three said additional units of power which have not yet been installed, but at no time prior to the 16th day of October, 1901, was the construction of the defendant's dam sufficiently advanced to close its waste gates or to raise the waters of the stream so as to flow the plaintiff's land, or diminish the head of water created by the plaintiff's dam, or interfere with the operation of said water wheels of the plaintiff installed as aforesaid.

The defendant's expenditure for such power development was a sum aggregating $800,000 exclusive of the cost of the said new mill and its present equipment. And the plaintiff's expenditure for its power development was a sum aggregating $271,000.

The Ludlow Manufacturing Company on the 3d day of August, A. D. 1899, began it, said dam by commencing the construction of

the tail race thereof and within a reasonable time after the said employment of said Ball and commencement of said work by said Ball and said agents and employees as aforesaid, and within a
54 resonable time after making its beginning of its said dam as aforesaid, completed said dam, said buildings constructed as aforesaid, for the installation of said water wheels and generators, and said development, and also said transmission lines, and said mechanisms hereinbefore referred to, and, within a reasonable time after the employment of said Ball and said agents and employees as aforesaid and after making its said beginning as aforesaid, and before the completion as aforesaid, completed a new mill on said river about four miles below its said dam and in the vicinity of other mills of the Ludlow Manufacturing Company also on the same stream, for the working of which mill so completed and its other mills on the same stream, which other mills had been theretofore constructed, it can apply and use as aforesaid the waters of said river, if raised by its said dam, by generating, transmitting, and using electrical power, and has so applied and used them temporarily on and subsequent to March 8, 1902, and not before, on occasions of and after heavy rains when the waste gates of its dam were inadequate to discharge the flow of the river, and on October 16, 1901, the date of the completion of said dam as aforesaid, would have closed its waste gates and kept open its canal gates and would have continuously so applied and used said waters for the operation of its aforesaid mills from the said date of the completion of said dam but for the pendency of this suit and the action of the court therein, a copy of which action is hereto annexed marked " X," and the agreement of parties made October 15, 1901, whereby it was provided on the part of the defendant that it would not close its waste gates and on the part of the plaintiff that it would not apply for an injunction without notice by each respectively to the other of forty-eight hours of its intention so to do, which agreement was to be without advantage to the plaintiff and without prejudice to the rights of the defendant. By reason of this suit and said action and agreement, the Ludlow Manufacturing Company has not closed said waste gates since the said date of the completion of the dam. The Ludlow Manufacturing Company used all due diligence in completing its said dam on the aforesaid date, and the fact that it was not completed at an earlier date and that the waters of the stream were not raised thereby at an earlier date was not due to any negligence or laches on the part of the defendant. The waste gates of both dams are at the bottom thereof respectively. The defendant's said dam can also be, and in fact on the aforesaid occasions on and subsequent to October 16, 1901, was used for water storage purposes by said defendant for its aforesaid mills.

The bottom of the canal of the defendant at its canal gates is from seven and one half to ten inches higher than the surface of the water of the tail race at plaintiff's dam when the plaintiff's wheels are running. The defendant's said canal is constructed of solid

masonry and concrete and the water from said canal is conducted through penstocks to and upon the wheels of the defendant
55 and thence through draft tubes to the tail race of defendant, discharging into said river. On the 4th day of April, 1900, the plaintiff determined to build a dam at the site of its present dam and then began its preparatory work therefor and prosecuted the same with due diligence until the 11th day of August, 1900, when it began the work of excavating for the foundations of its said dam, and from said latter date continuously it prosecuted the work with due diligence to the completion within a reasonable time of its aforesaid dam, said building constructed as aforesaid for the installation of said water wheels, and the generators and the said development and also the said transmission lines and the mechanisms hereinbefore referred to.

With the waters of the river raised to the crest of the plaintiff's dam as built, without the flash boards (elevation 278.29 feet), the plaintiff's dam will flow the plaintiff's land and a portion of the land formerly comprehended by the highway which was discontinued by the county commissioners on petition, the record of which has been introduced in evidence, Exhibit 14, which latter land is described in Exhibits 7 and 8, and at that elevation will flow no other land. If the said waters are raised above the crest of the plaintiff's dam three inches, it will flow in addition a strip of land of the Boston & Albany railroad, and if raised to the elevation 279.29 feet, it will flow said strip of land seventy feet along the river a maximum width of three feet. With the water raised by the dam to an elevation of 281.29 it will flow the said railroad's land for a distance along the river of two hundred and fifty feet, and a maximum width of fifteen feet.

The Ludlow Manufacturing Company commenced both the preliminary, preparatory, and permanent work of building its said dam before the plaintiff began its preliminary, preparatory and permanent work of building its said dam; and the Ludlow Manufacturing Company commenced the work of constructing its said dam before the plaintiff commenced the work of constructing its said dam.

The plaintiff completed its said dam before the Ludlow Manufacturing Company completed its said dam.

The plaintiff raised the waters of said river, by its said dam as aforesaid, and used them in working the water wheels of said unit as aforesaid, and by electrical power generated and transmitted as aforesaid, worked said portions of its said cotton mill as hereinbefore stated before the completion of the defendant's said dam and before the waters of said river were raised by the defendant's said dam.

The petitions to the county commissioners of Hampden county filed by the respective parties relative to them respectively, and the plans and specifications filed by them respectively and the action of the said county commissioners thereon and the entire record of the county commissioners concerning the same, may be introduced in

evidence, and each of said parties may also introduce in evidence competent testimony concerning the same, but neither of the
56 said parties is precluded from making the claim that the said plans and specifications so filed, and said action and record or any part thereof, are conclusive.

The defendant, wherever referred to herein, means The Ludlow Manufacturing Company; and wherever the words "party" or "parties" are used as designating a defendant, The Ludlow Manufacturing Company is thereby meant.

Each party may introduce in evidence plans, maps and photographs descriptive of their respective developments.

Neither party is hereby precluded from introducing all competent evidence upon any feature of the case not covered by this stipulation.

X.

"This cause came on to be heard October 31, 1901, upon an application by the plaintiff for a preliminary restraining order as prayed in the bill, and thereupon, the defendant's attorney stating that the waste gates in the Ludlow Manufacturing Company's dam have not been closed, or if closed, shall be opened, and shall not again be closed without giving the plaintiff forty-eight hours' notice thereof, no restraining order is made at this time, this order being made without prejudice in any way to the rights of either the plaintiff to further apply for such restraining order or of the defendant to oppose the granting of the same.

By Plaintiff's Attorneys, C. L. GARDNER.
B. B. JONES.
By Defendants' Attorneys, WALTER S. ROBINSON.
JAS. B. CARROLL.
WILLIAM H. BROOKS."

At the date of the filing of its bill in this cause, the plaintiff was the owner of the real estate therein described, and was, and for a long time had been, operating a mill thereon, and in this mill had been carried on the business of manufacturing cotton fabrics. The plaintiff also had a dam at this cotton mill. This mill was about three quarters of a mile above the site of the plaintiff's lower dam named in the bill, on the Chicopee river. The real estate then owned by the plaintiff comprised all the land flowed by this dam herein called the lower dam. The defendant Ludlow Manufacturing Company, at the same time owned the land on which it was then erecting its dam mentioned in the plaintiff's bill, and all land above this dam on the river, and which was flowed by it, except a small piece, and except also the land conveyed to the Ludlow Cord-
age Company, by Edwin D. Metcalf, December 3, 1898, and
57 certain lands of the plaintiff specified in the said stipulation between the parties. The Ludlow Manufacturing Company also owned other lands below this dam on the stream and elsewhere

in Ludlow, and owned and operated a mill thereon, in which it carried on the business of manufacturing fabrics from hemp and sisal. This mill of the Ludlow Manufacturing Company was between four and five miles down stream from its dam then in process of erection, viz.: the Red Bridge dam. The Ludlow Manufacturing Company also had a dam at the site of this mill. The Red Bridge dam was nearly two miles down the stream from the plaintiff's lower dam, but was not placed on land at any time owned by the plaintiff or by said Metcalf. The defendant Ludlow Cordage Company owned no land, mill or dam, unless the tract conveyed to it by Metcalf, December 3, 1898, was owned by it. It was a tenant of the Ludlow Manufacturing Company, occupying a portion of one of the mill buildings of that company, and paying rent therefor. It manufactured cordage from hemp and sisal and required and used in this business from 250 to 275 horse-power, which it hired of the Ludlow Manufacturing Company. The Ludlow Cordage Company was organized and began business in February, 1893. It began in a small way, and increased its business from year to year. The Ludlow Manufacturing Company and the Ludlow Cordage Company were each corporations having a distinct corporate existence. On September 26, 1882, the plaintiff was operating its cotton mill, and owned the entire south bank of the river from this mill to the Shearer lot, which is marked No. 7 on the plan dated February, 1902, hereinafter mentioned, and Metcalf owned the south bank below the Shearer lot, called the Sprague lot, and marked on said plan "Metcalf privilege," and at that time The Otis Company, the plaintiff, owned the north bank, being lot No. 1 on said plan extending from said dam to the Barker lot, No. 5 on said plan, and Metcalf owned the north bank just below the Barker lot, called the Green lot; the Otis Company at the same time owned to the thread of the stream on both sides between its upper mill dam and the Barker lot, and owned to the thread of the stream on the south side of the river between lot No. 1 and the lower line of the Barker lot, and from the lower line of the Barker lot to the Shearer lot the Otis Company owned to the thread of the stream on both sides, but did not own the bank on the north side of the river, and it did not then own the land conveyed to it by Honorah A. Dunn, on a part of which a portion of its lower dam is erected. This Dunn land was conveyed to the plaintiff by two deeds, which were dated March 2, 1901. These deeds were given subsequent to the beginning of the construction of the plaintiff's lower dam.

The plan of land of Otis Company on Chicopee river, dated February, 1902, by J. K. Barker, engineer, and used at the hearing before me, may be referred to.

The plaintiff contended that an agreement of September 26, 1882, between it and Edwin D. Metcalf, who was then the owner of
58 the land conveyed by deed, in which the Ludlow Cordage Company was named as grantee, which agreement and deed are herein recited, precluded the Ludlow Manufacturing Company

from building and maintaining a dam at the present site of its present dam at Red Bridge, which would raise the waters of the stream to a greater height than that prescribed by the sixth clause of said agreement, and offered evidence, hereinafter set forth, for the purpose of showing that the deed to the Ludlow Cordage Company was colorable, that the Metcalf property was really purchased by the Ludlow Manufacturing Company for its own purpose, and that the Ludlow Manufacturing Company is equitably the owner of said land.

This evidence was objected to by the defendant, and it seemed to me immaterial in view of rulings of law hereinafter set out. If, however, said rulings of law are incorrect, then I find as follows, to wit:—

Said dam does raise the waters of the stream to a greater height than that prescribed by said sixth clause of the Metcalf agreement.

On September 26, 1882, the plaintiff and Edwin D. Metcalf executed and delivered to each other an agreement in writing, not under seal and not acknowledged or recorded, of which the following is a copy:

(Copy.)

Memorandum of agreement made this 26th day of September, A. D. 1882, by and between the Otis Company, a corporation duly established by law and having its usual place of business in Boston, Massachusetts, and Edwin D. Metcalf, of Springfield, Massachusetts, both of which parties are the owners of certain lands and water rights on the Chicopee river below Three Rivers and in said Palmer.

First. Said company agrees to purchase a certain parcel of real estate lying on the southerly side of said river & extending back therefrom situate in said Palmer and known as the Shearer property as soon as reasonably may be and at such price as the parties hereto may mutually agree upon.

Second. As soon as said real estate is so purchased said company agrees to convey to said Metcalf, in consideration of one dollar, all that portion thereof which lies below a stake set below the brook on Saturday last by the parties hereto.

Third. Said Metcalf agrees to then convey to said company, in consideration of one dollar, all that portion of the Green property owned by him, situate on the opposite side of said river, which lies above a point in range with said stake.

Fourth. Both parties hereto will aid in all reasonable ways in the consummation of said purchase of said Shearer property, and not in any reasonable manner do anything to interfere with such purchase and said property, and no part thereof shall be pur-
50 chased by either of said parties or any one in their behalf, except in pursuance of this agreement.

Fifth. Until such purchase shall be consummated, all work in the

way of developing and improving these respective water powers on said river below Three Rivers thall be wholly suspended by the parties hereto.

Sixth. Said Metcalf or his assigns shall not construct a dam in the development of his or their power which shall afford more than 21 32/100 feet fall, and said company or its assigns shall not construct a dam in the development of its or their power which shall afford more than 19 65/100 feet fall or such portion of the supposed total fall of 40 97/100 feet as 21 32/100 bears to 19 65/100.

Seventh. This agreement shall not be vacated or annulled except by the mutual consent of both the parties hereto unless said company shall fail to purchase said Shearer property within six months from the date hereof, but, in the event of such failure, these presents shall become null and void at the expiration of said period, and whatever rights if any under the mill act or otherwise either of said parties has heretofore acquired, shall not in any way be affected by this agreement unless said purchase is consummated as hereinbefore provided.

Witness our hands the day and year first above written.

OTIS COMPANY,
By EDWIN H. BAKER, Agent.
EDWIN D. METCALF.

Executed in presence of
CHARLES L. GARDNER.

The fall of the river between the surface of the water in the plaintiff's tail race at the upper mill and the lower boundary of Metcalf's land, to wit, of the Sprague lot, was 40.97 feet, and from the surface of said tail race water to the stake mentioned in the second article of the agreement between Metcalf and the plaintiff hereinbefore set forth, the fall was 19.65 feet, and from said stake to the lower boundary of the Shearer lot the fall was 21.32 feet.

In pursuance of the agreement between the Otis Co. and Metcalf, the Otis Co. purchased and acquired title by deed duly executed and recorded to the Shearer lot, which is the Shearer property mentioned in said agreement, and conveyed to said Metcalf by deed dated March 14, 1883, recorded March 22, 1883, the portion of said Shearer lot lying below said stake mentioned in the 2d article of said agreement, and Metcalf, by deed dated March 14, recorded March 23, 1883, conveyed to the Otis Co., in pursuance of said agreement, all that portion of the Green property mentioned in
60 the 3d article of said agreement on the opposite side of said river lying above a point in range with said stake, the same being lot No. 6 on said plan, dated February, 1902.

On the 9th day of May, A. D. 1883, the Otis Co., by deed of that date, recorded May 25, 1883, acquired title to the Barker lot and to the thread of the stream on the northerly side of the river between lot No. 1 and the lower line of the Barker lot.

The deeds from the Otis Co. to Metcalf, and from Metcalf to the

Otis Co., are respect*fully* as follows, and were delivered upon the dates of the respective acknowledgments thereof:—

"*Know all men by these presents*, that the Otis Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, in consideration of one dollar to it paid by Edwin D. Metcalf, of Springfield, in the county of Hampden and Commonwealth aforesaid, the receipt whereof is hereby acknowledged hereby remises, releases and forever quitclaims unto the said Metcalf, his heirs and assignees, a certain tract or parcel of land, situate in Palmer, in said county of Hampden, on the northerly side of the highway leading from Three Rivers to Springfield, and about one mile westerly from said Three Rivers, bounded and described as follows: Beginning at a point in the Chicopee river on the northeasterly line of grantor's land, N. 61½° E., of a copper bolt set in a rock on or near the southwesterly bank of said river, about two hundred and fifteen feet below the mouth of a brook, being the southwesterly corner of land this day conveyed by the grantee to the grantor. Thence S. 61½° W. to said copper bolt. Thence in the same direction eighty and one half feet to an iron bolt with a ring in it set in a rock in the bank wall, on the northeasterly side of said highway. Thence bounded southerly by said highway, westerly by land of one Talmadge and a road leading from said highway past the house of said Talmadge, and northerly and northeasterly by land of the grantee and by said river to the place of beginning; said northerly and northeasterly line supposed to be the southerly and southwesterly line of grantee's land, containing about twenty-eight acres, more or less, with the privileges and appurtenances thereto belonging.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said Metcalf, and his heirs and assigns, to their own use and behoof forever. And said corporation hereby covenants with the grantee, and his heirs and assigns, that the granted premises are free from all incumbrances made or suffered by it, and that it will warrant and defend the same to the grantee, and his heirs and assigns forever against the lawful claims and demands of all persons claiming by, through, or under it, but against none other.

In witness whereof, the said Otis Company has caused its corporate seal to be hereto affixed and these presents to be signed
61 in its name and behalf by George F. Fabyan, its treasurer, this fourteenth day of March, in the year one thousand eight hundred and eighty-three.

OTIS COMPANY, [L. S.]
By GEO. F. FABYAN, Treasurer.

Signed and sealed in presence of
A. L. RICHARDSON.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

BOSTON, March 17, 1883.

Then personally appeared the above-named Geo. F. Fabyan and acknowledged the foregoing instrument to be the free act and deed of the Otis Co.

Before me,

ALBERT L. RICHARDSON.
Justice of the Peace."

"*Know all men by these presents*, that I, Edwin D. Metcalf, of Springfield, in the county of Hampden, and State of Massachusetts, in consideration of one dollar paid by the Otis Company, a corporation duly established under the laws of said State, the receipt whereof is hereby acknowledged, do hereby release, remise and forever quitclaim unto the said Otis Company a certain tract or parcel of land situated in Palmer, in said county of Hampden bounded and described as follows: Beginning at a point in the Chicopee river, on the southwesterly line of grantor's land S. 61½° W. of an iron bolt with a ring in it, set in a rock about sixteen feet from the northeast bank of said river; thence N. 61½° E. to said iron bolt; thence in the same direction ninety-six and one half feet to another iron bolt, with a ring in it, set in a rock; thence in the same direction about eighty feet to land of the Boston and Albany Railroad Company; thence bounded northeasterly by land of said railroad company; thence bounded southeasterly by land of Franklin Barker; thence bounded southwesterly by said river to the place of beginning, said southwesterly line supposed to be the northeasterly line of grantee's land and containing five acres, more or less.

To have and hold the granted premises, with all the privileges and appurtenances thereto belonging to the said Otis Company and its successors and assigns to their own use and behoof forever. And for the consideration aforesaid, I, Carrie W. Metcalf, wife of said Edwin D. Metcalf, do hereby release unto the said grantee and its successors and assigns all right of or to both dower and homestead in the granted premises.

62 In witness whereof, we, the said Edwin D. Metcalf and Carrie W. Metcalf, hereto set our hands and seals this fourteenth day of March, A. D. 1883.

EDWIN D. METCALF AND SEAL.
CARRIE W. METCALF AND SEAL.

Witness:
G. WELLS to E. D. M.
M. E. FLINT to C. W. M.

COMMONWEALTH OF MASSACHUSETTS, Hampden, } ss:

March 14, 1883.

Then personally appeared the above-named Edwin D. Metcalf, and acknowledged the foregoing instrument to be his free act and deed.

Before me,

GIDEON WELLS,
Justice of the Peace."

The Metcalf agreement has not been vacated or annulled by the mutual consent of the parties thereto, or in any other manner, unless such is the legal effect of the deed from Metcalf to the Otis Company and that from the Otis Company to Metcalf.

Both the plaintiff and the Ludlow Manufacturing Company had for several years prior to beginning construction of their respective dams considered the question of additional power, the need of such additional power having grown. December 15, 1891, the stockholders of the Ludlow Manufacturing Company passed the following vote, on motion of Mr. Wallace, one of its directors:—

"On motion of Mr. Wallace seconded by P. M. Weld, it was voted: That the treasurer be authorized to purchase such parcels of land, water rights, or water power on the Chicopee river as may be deemed for the best interests of this corporation, subject to the approval of the board of directors."

And by several deeds of the same date as this vote, several tracts of land were conveyed to this defendant, on a portion of which a part of the Red Bridge dam and its canals and power house are now built, but all the other lands of this corporation, connected with the development of this water power, were acquired by it from various owners on and subsequent to February, 1899. The map of the entire property of the Ludlow Manufacturing Company used at the hearing before me and marked "Exhibit 42" may be referred to. The Ludlow Manufacturing Company had increased its power from time to time by the introduction of stream engines and additional water wheels at its lower dam at its hemp mill at Ludlow, and the plaintiff had also increased its power by steam engines and additional water wheels at its upper dam at its cotton mill in Palmer.

63 The deed from Metcalf to the Ludlow Cordage Company was procured by the Ludlow Manufacturing Company. The land described therein was purchased by the Ludlow Manufacturing Co. for its own purpose, namely, the development of additional water power, and paid for with its own funds. The existence and terms of said agreement between the Otis Co. and Metcalf was at the time of procuring said deed known to the Ludlow Manufacturing Co., and this deed was taken by the Ludlow Manufacturing Co., in the name of the Ludlow Cordage Co., in part for the purpose

of concealing the true ownership of said property and of evading the obligations imposed upon Metcalf and his assigns by the 6th article of the Metcalf agreement. The Ludlow Manufacturing Co. is in equity the real owner of the said property and retains title in the name of the Ludlow Cordage Co. for the purposes above stated.

Since the last finding is an inference from a number of facts, involves the question of the authority of certain officers and agents of the Ludlow Manufacturing Company, and may be considered an inference of law, as well as of fact, and as the evidence upon which it was based was objected to by the Ludlow Manufacturing Company, I state so much of the evidence as seems to me necessary for the proper understanding of the inference, so far as it is an inference of law, and the objections made to the evidence.

The capital stock of the Ludlow Cordage Company was 1000 shares, of which all but 220 shares were owned by stockholders of the Ludlow Manufacturing Company. There were in 1898 thirty-six stockholders of the Ludlow Manufacturing Co., holding 5230 shares of a total capital of 7500 shares of the Ludlow Manufacturing Co., who were not stockholders of the Ludlow Cordage Co. Each company had five directors, and three of them, Messrs. Brooks, Wallace and Weld, were the same in each company. The Ludlow Cordage Company had the same office and the same bookkeeper in Boston, as the Ludlow Manufacturing Company. It was a tenant of the Ludlow Manufacturing Company at its mill in Ludlow. It owned no land of its own at all, ether before or since the Metcalf conveyance of December 3, 1898, unless the land conveyed to it by Metcalf is owned by it. It then needed and was using power to the extent of 250 to 275 horse-power and its present needs and use of power are substantially the same. Such power has always been furnished by the Ludlow Manufacturing Co., and neither company contemplated that the Ludlow Manufacturing Co. would cease to furnish such power, though Wallace and Stevens for several years beginning in 1894 had considered the advisability of the purchase of the Metcalf tract by the Ludlow Cordage Co., and they and Hubbard spent several hours in 1894 in examining that tract.

The natural fall of the stream on the land conveyed by Metcalf by the deed of December 3, 1898, would develop from 1000 to 1500 horse-power, and the Ludlow Cordage Company never took any steps to develop a water power.

64 The negotiations for the purchase from Metcalf were conducted by one John E. Stevens, then the manufacturing agent at Ludlow, of the Ludlow Manufacturing Company, in the name of the Ludlow Manufacturing Company, with the knowledge of Hubbard, its treasurer and one of its directors, and with the knowledge of Wallace, its selling agent and one of its directors.

These negotiations were conducted by letter, by personal interview and by telephone. The purchase was agreed upon by Stevens and Metcalf on November 21, 1898. On the same date Stevens, at

Ludlow, notified Hubbard and Wallace in Boston by telephone of this agreement for purchase, and they both assented thereto.

On the same date, to wit, November 21, 1898, Metcalf wrote two letters to the Ludlow Manufacturing Company, one addressed to Ludlow, and one to Boston, stating in each that he had sold the property to the Ludlow Manufacturing Company. Both letters were acknowledged by letters written November 22, 1898, one by John E. Stevens, in the name of the Ludlow Manufacturing Company, at Ludlow, and one by Hubbard, at Boston.

These and other letters from Metclalf to the Ludlow Manufacturing Company and from the Ludlow Manufacturing Company to Metcalf were introduced in evidence, and the following exhibits numbered 24, 25, 26, 27, 29, 31, 28, 39, 46, 32, 34, 33, 40, 35, 36, 44, are copies thereof:—

EXHIBIT No. 24.

Ludlow Manufacturing Company,

LUDLOW, MASS., July 9th, 1898.

E. D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: We are advised that you desire to sell your property on Chicopee river near Three Rivers. If this is so, kindly advise us what is the lowest cash price you care to consider; we might be interested in the property at a price.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 25.

JULY 15, 1898.

Ludlow Manufacturing Company, Ludlow, Mass.

GENTLEMEN: Your esteemed favor of July 9th was duly received during my absence, and in reply will say that I purchased the property to build a mill, but became engaged in business here and, therefore, would be willing to sell it for a satisfactory price.

65 I did sell the same two or three years ago for $20,000 for a paper mill, but hard times coming on in the paper industry just then broke up the sale. There is about forty acres of land on both sides of the river, and I hold an agreement with the Three Rivers Manufacturing Company as to the rights I have, which is about twenty-one feet fall. This, of course, gives a large power. I did have plans drawn for a dam across a point where it can be built very cheaply and easily. If the subject interests you, I could meet any of your people in Boston this summer, as I shall spend a portion of the summer, at least, at my house at Martha's Vineyard.

Awaiting your reply, I am,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 26.

Ludlow Manufacturing Company.

LUDLOW, MASS., Oct. 12th, 1898.

Mr. Edwin D. Metcalf, Auburn, N. Y.

DEAR SIR: Your favor dated 15th of July came duly to hand. We have now definitely decided to increase our power plant, either by steam, or water with electric transmission, or by re-locating heavy branches of our business at tide water.

Our plans and figures for first proposition are well along, and we have now reached a point where it would interest us to learn the lowest cash price you are willing to consider for your property next Otis Co. If you will write us, stating price, giving us an option far say one month, so that we may make survey and estimates of cost to develop the property, your figures will be considered absolutely confidential; or if you prefer to have an interview, either our treasurer, Mr. Hubbard, or myself, or both of us, can arrange to meet you, say at Springfield, or Boston, if you are likely to be there.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 27.

OCT. 13, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: Your esteemed favor of Oct. 12th has been duly received, and in reply will say that I expect to be in New York at the Cordage Manufacturers Association, 46 South St., Oct. 20th. As you are in the cordage business, will not some representative of your company be present at that meeting. If so, I should be
66 pleased to go over the question of the sale of my property and water power in Palmer, as matters of that kind can be discussed much better personally than by correspondence.

Messrs. Tower and Brother, the engineers at Holyoke, Mass., surveyed this thoroughly and drew plans for its improvement, and could give you full details as to that. I can send you a copy of the agreement between Otis Manuf. Co. and myself, if you desire, but it is agreed between us that there is between 20 and 21 feet of fall belonging to this property of mine.

Kindly advise me if some one representing your company is expecting to be in New York about that time, and oblige,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 29.

OCT. 14, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: That you may know just what my property in Palmer is and what rights I have, I will send you memorandum of deeds and a copy of agreement between Otis Co. and myself.

The first deed on the south side of the river was from Z. Chafee, trustee for A. & W. Sprague Manuf. Co., dated July 31st, 1882, and recorded in Book 390, page 35.

The next was from George D. Green and wife, dated Aug. 19th, 1882, and recorded in Book 389, page 182.

The next from the Otis Co., dated March 22d, 1883, recorded in Book 393, page 467.

A small portion of the land I purchased from George D. Green I transferred to the Otis Co. at the same time that they transferred to me the large piece of land which surrounded the original purchase made from Mr. Chafee. In all there must be somewhere in the neighborhood of 40 acres of land between the Boston & Albany R. R. tracks on the north side of the river and the main road from Three Rivers to Springfield on the south side.

Also enclosed find copy of memorandum of agreement entered into between the Otis Co. and myself in regard to division of rights in the river. At one time we were competing for the purchase of one piece of property, and we decided to pool our issues and come to an understanding as to our respective rights. You will see by this that the total fall is estimated at 40.97 ft., of which the Otis Co. own 19.65 and I 21.32. The fall was carefully surveyed by
67 two different engineers, one representing them and one representing me, and I have no reason to doubt but what it will be found to be correct.

Tower Brothers, engineers at Holyoke, surveyed this some five years ago, and cross-sectioned the whole territory in that neighborhood with a view of knowing how to develop the power most economically. They had an option on the water power at that time for a certain period at $20,000, which I have always considered the property worth. However, I am prepared to waive that and would name a better figure than that if your people were in earnest and desired to purchase.

In regard to payment, would say that any payment which your people might wish to make would be entirely satisfactory to me, either long or short time—of course, the same being upon interest.

As your company is interested in cordage and I am also, I hope that either Mr. Stevens or Mr. Hubbard will arrange to be in New York on the 20th, at which time the cordage interests are to meet in regard to the continuance of the present understanding between them. The meeting is to be at 46 South street. I should really like to talk with your people in regard to naming prices for twine; we

are refusing to name any price at the present time, pending a settlement of the price of fibre, and think that if no one would name prices absolutely until March 1st, it would be better and a safer business would be done.

We could accept orders subject to fixing of price March 1st. That is quite often done in our business.

Yours truly, EDWIN D. METCALF.

EXHIBIT No. 31.

Ludlow Manufacturing Company.

LUDLOW, MASS., Oct. 17, 1898.

Edwin D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: I have your two favors dated 13th and 14th inst., and note carefully all you write. I am greatly obliged for the description of your Palmer property. I didn't know about the bounds or size thereof, nor of your agreement with the Otis Co. I have never discussed the subject with them. Mr. Geo. D. Green, who is a near neighbor, has spoken to me of the property, and thought you might wish to dispose of it.

I may state that we are very decidedly in earnest about adding to our power. This, indeed, is a necessity, and we should not think of considering anything below 1000 horse-power. The provisional plans we have made for development by steam are, indeed, for 1500 horse-power. We are not at all agreed as between steam and water, and a decision on this point will only be reached after our plans are completed.

68 You, of course, are well aware that great strides have been made in the development of power from coal. I know one large concern in the western part of this State which claims to produce a horse-power for figures that seem fabulous. There is also this to be said, that the cost of installing steam power can always be estimated with reasonable exactness. On the other hand, I have faith in really good water powers when cost of development is not extreme. How this may be in your Palmer property, we do not yet know. My idea is that if we get a favorable option from you, we can put an engineer on the property and know inside two or three weeks just what we can do. I feel warranted in saying that if the figures which result from our examination of the property are favorable, there is every probability that we shall become purchasers. Of course I do not know whether you are anxious to sell the property or indifferent about it, and naturally that will influence your ideas of value.

I am trying to explain our position as frankly as words will do it. You will please not understand it as designed to influence your views, but I am desirous, so far as you can meet me, to make the presentation of installation by water as favorable as possible as against steam power, which is preferred by some interested with us.

I quite agree with you that with an exchange of views, we would make progress much more rapidly than by writing, and if an interview can be arranged, that will be best. I hope something may come of it, and if not, no harm will be done.

Mr. Hubbard, our treasurer, is just now in New Hampshire, and I do not expect him back before the 20th inst. There is a chance that I may be in New York on the 19th late or on the morning of the 20th. If I am there, it would be at the Hotel Manhattan. I should feel obliged if you would inform me by return mail if you could see me there as early as 8 o'clock in the morning of the 20th. I am obliged to be back here on the afternoon of that day. Also advise me your address in New York, so that I can wire you there if my plans are changed.

In the matter of cordage, I note all you say. The points raised are exclusively in the hands of Mr. Wallace, who is treasurer of our cordage Co. From what I know of his plans I do not think he expects to be in New York this week. I shall probably see him, however, on Saturday and will convey what you write. My impression is very strong that he is entirely averse to making any prices on binder twine at present.

Sisal is an enigma, and I do not think any living person knows what it will be worth next March. The excessively big jumps in prices for sisal and manila make the cordage business exceedingly difficult for all concerned.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

69 EXHIBIT No. 28.

Ludlow Manufacturing Company.

LUDLOW, MASS., Oct. 19th, 1898.

E. D. Metcalf, Esq., Adams house, Boston, Mass.

DEAR SIR: Your day message reading as follows: "Shall be in Boston to-morrow forenoon. Address, Adams house," duly received. It will be very convenient for us to see you in Boston, and I expect to call at the Adams house about 10.15 a. m.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 39.

Nov. 21, 1898.

Ludlow Manuf. Co., Boston, Mass.

GENTLEMEN: Agreeable to my conversation this morning with Mr. Stevens over the long distance telephone, I have sold you my

water power at Palmer, Mass., for the sum of fifteen thousand dollars ($15,000) and am having deed prepared to-day, as I leave for the West to-night. I am having the same kind of deed prepared that I purchased under, but have authorized Mr. Stevens to have the title investigated at my expense. I satisfied myself fully in regard to this matter at the time of purchasing, but as I have not the written evidence, take this course.

I believe this to be the largest undeveloped water power in the State of Massachusetts, and considering the amount of power there, this is merely a nominal figure for it. Had I remained in Springfield, I should have developed it for a manufacturing business myself.

During the palmy days of the A. & W. Sprague Manuf. Co., a former manager of the Ware mills went to Providence and interviewed Mr. Sprague as to what he would sell the property for, and he placed a valuation upon it then of $75,000. This was some thirty years ago.

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 46.

Nov. 21, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: Agreeable to my conversation over the telephone with Mr. Stevens, I have this day sold you my water power in
70 the town of Palmer for the sum of fifteen thousand dollars ($15,000), and will prepare the deeds to-day, as I expect to leave for the West to-night. With the deeds, I will send you my deeds, that you may investigate the matter, and think that I will send them direct to your office, as there will have to be titles looked up at Springfield. I am having deed drawn to you of the same character of the deed drawn to me, that is quitclaim, but as I should furnish you evidence that title is all right, you may have the title investigated, and a bill sent to me for this investigation, which I will pay.

Trusting that this will be satisfactory, I am,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 32.

Nov. 21, 1898.

Ludlow Manuf. Co, Ludlow, Mass.

GENTLEMEN: Enclosed please find deed of my water power at Palmer, Mass., which I have this day sold you, agreeable to previous letter, for $15,000; also deed from Z. Chafee, trustee, to me, deed from George D. Green to me, Otis Manuf. Co. to me, and original agreement between the Otis Co. and myself.

This deed from me to your company is delivered to you as an escrow pending your satisfying yourself as to my title. Kindly in-

vestigate the same at your earliest convenience; also kindly send me a letter acknowledging receipt of these deeds as escrow pending such investigation, and oblige,

Yours very truly, EDWIN D. METCALF.

EXHIBIT No. 34.

OFFICE OF THE LUDLOW MANUF. CO.,
133 ESSEX STREET, BOSTON, Nov. 22, 1898.

Mr. Edwin D. Metcalf, Auburn, N. Y.

DEAR SIR: We have duly received your letter of November 21st, confirming sale of the water power at Palmer, negotiated with our Mr. Stevens, and in behalf of the company I hereby confirm the same, subject to title proving satisfactory, of which I have no doubt.

Yours truly, CHARLES W. HUBBARD, Treas.

71 EXHIBIT No. 33.

Ludlow Manufacturing Company.

LUDLOW, MASS., Nov. 22d, 1898.

Edwin D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: Your favor, dated November 21st has been duly received, together with documents as named. These will have immediate examination and I hope we shall be ready to close the business in a few days. You will meantime receive from the treasurer of this corporation confirmation of the agreement made between you and myself.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 40.

Nov. 30, 1898.

Ludlow Manuf. Co., Ludlow, Mass.

GENTLEMEN: On my return to-day, I do not find any communication from you in regard to deeds, except acknowledging receipt. As your attorney has had ample time to investigate title, kindly let me hear from you.

Yours truly, EDWIN D. METCALF.

EXHIBIT No. 35.

Ludlow Manufacturing Company.

LUDLOW, MASS., Nov. 30th, 1898.

Edwin D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: You would have heard from us before now, but the perfectly awful weather prevented our engineer checking up some bonds. I think, however, we are now ready to *consummate* the business, but, if possible, would like to see you about some *matters of detail*. You spoke of coming East about this time; if this is still your plan, kindly advise if you can call at our treasurer's office in Boston, or if you are coming to Springfield, that will do equally well. If your plan is changed we will try to write the points about which we desire to speak, but an interview is everyway so much more simple and satisfactory.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

72 EXHIBIT No. 36.

Ludlow Manufacturing Company.

LUDLOW, MASS., Dec. 1st, 1898.

E. D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: As just arranged with you by telephone, one of us will plan to meet you Saturday forenoon at Auburn, and I think everything can then be arranged and business settled.

Just before telephoning you, I had dictated a longer letter which it is not now necessary to mail, as a verbal exchange of views will be so much more satisfactory.

Yours truly,

LUDLOW MANUFACTURING COMPANY.
J. E. STEVENS, Agent.

EXHIBIT No. 44.

Ludlow Manufacturing Company.

LUDLOW, MASS., Dec. 6th, 1898.

E. D. Metcalf, Esq., Auburn, N. Y.

DEAR SIR: Referring to transfer of property just negotiated with you, I will feel greatly obliged if you will kindly consider the matter as confidential. We prefer that it should not be made public for the present.

Yours truly,

LUDLOW CORDAGE CO.,
By J. E. STEVENS, Ag't.

In 1898 said Stevens was a director of the Ludlow Cordage Co. He was not an officer of the Ludlow Manufacturing Co., but he was its manufacturing agent and one of three persons named by the directors of the Ludlow Manufacturing Co. in their vote of December 20, 1898, as "the management." Hubbard, the treasurer of the Ludlow Manufacturing Co., in 1898 was not a stockholder, director or other officer of the Ludlow Cordage Co.

Prior to November 22, 1898, the substance of the agreement between the Otis Co. and Metcalf was known to Hubbard. He had known, not later than October 20, that an agreement existed between Metcalf and the Otis Company under which the fall claimed to be owned by Metcalf in connection with the privilege was about 21 feet, and that there was an agreement existing between the Otis Company and Metcalf with reference to such fall. Stevens had seen a copy of that agreement not later than October 20, 1898, because a copy thereof had been inclosed by Metcalf in a letter written
73 to the Ludlow Manufacturing Company at Ludlow, dated October 17, 1898, and received by Stevens in due course of mail. In October or November, 1898, the exact date was not fixed, but it was not later than November 23, 1898, and was apparently earlier, Stevens, in behalf of the Ludlow Manufacturing Company, employed the attorney of that company to examine the title to the Metcalf land. This attorney made an oral report of his examination to Stevens. Stevens then stated to Hubbard and Wallace that a deed should not be taken from Metcalf containing a restriction, and suggested that a deed be taken without a restriction in the name of the Ludlow Cordage Company. To this also Hubbard and Wallace assented.

A deed from Metcalf, executed by him, to the Ludlow Manufacturing Company, of the Metcalf land, was enclosed in the letter of Metcalf to the Ludlow Manufacturing Company at Ludlow, November 21, 1898, and was received the following day. This deed referred to and was made subject to the Metcalf agreement with the Otis Company, but without reciting either the substance or effect thereof. The letter enclosing it also contained the original Metcalf agreement. Both this deed of Metcalf to the Ludlow Manufacturing Company, and the Metcalf agreement, were submitted by Stevens to the attorney of the Ludlow Manufacturing Company. On November 25, 1898, Hubbard, treasurer of the Ludlow Manufacturing Co., directed the bookkeeper of that company, who was also the bookkeeper of the Ludlow Cordage Co., to draw a check to Edwin D. Metcalf, for land and water power at Palmer. Such check was drawn and the following is a copy:—

Ludlow Manufacturing Company.

Dolls. 15,000—#/100. BOSTON, Nov. 25, 1898.

Pay to the order of (New York check payable to) Edwin D. Metcalf, fifteen thousand #/100 dollars.

CHARLES W. HUBBARD, Treas.

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Two cent revenue stamp affixed bearing "I. R." in large blue print and "L. M. Co. 11/25/98" in ink.
(Indorsed:) Charles W. Hubbard, treas.

The stub of this check in the check-book contained the following entry:—

"Nov. 25TH, 1898.

"Edwin D. Metcalf paid him on a/c of land and water power at Palmer, Mass., $15,000."

This check was charged on the books of the Ludlow Manufacturing Co. to general expense of that company.

November 26, 1898, was the last day of the fiscal year of
74 the Ludlow Manufacturing Company, and the accounts between Ludlow Manufacturing Company and the Ludlow Cordage Company closed as of that date.

With the check above mentioned a draft upon New York for fifteen thousand dollars was obtained and placed in the hands of the attorney of the Ludlow Manufacturing Co., who went to Auburn, New York, and had an interview with Metcalf on December 3, 1898. He presented to Metcalf the deed to the Ludlow Cordage Company of the land purchased from Metcalf which he had already drafted, and returned to him the deed of the same land to the Ludlow Manufacturing Co. which had theretofore been sent by Metcalf. Upon examining the deed to the Ludlow Cordage Co., Metcalf referred to the change in the name of the grantee, and the attorney said, "We prefer to take the deed that way" or "My clients prefer to take the deed that way."

This deed to the Ludlow Cordage Co. was executed by Metcalf and his wife and delivered to the attorney on December 3, 1898, and the $15,000 draft delivered to Metcalf. This deed purported to remise, release and quitclaim to the Ludlow Cordage Co. the land conveyed to him by the Otis Co. and the land owned by him at the date of the execution of the agreement with the Otis Co. excepting a portion thereof which he had conveyed as above stated to the Otis Co. This deed was without any covenants of warranty whatsoever.

On December 20, 1898, at a meeting of the directors of the Ludlow Manufacturing Co. held immediately after the close of its stockholders' meeting, which stockholders' meeting was held at 11.40 a. m., the following votes were passed:—

"1. Voted that the treasurer be authorized to make such expenditures and in such manner as may be deemed advisable for the increased development of power.

"2. Voted that in view of the present earnings and prospects of the corporation, there be paid to each member of the management, *i. e.*, to Stevens, Hubbard and Wallace, the sum of $5000 as recognition of their services in addition to all salaries paid."

At this meeting Directors Hubbard, Weld, Brooks and Wallace were present.

On December 20, 1898, at a directors' meeting of the Ludlow Cordage Co. held at 11.20 a. m. in the same offices in which the directors' meeting of the Ludlow Manufacturing Company above mentioned was held, but in a different room, at which Directors Brooks, Weld, Stevens and Wallace were present, the following vote was passed, on motion of Mr. Weld, seconded by Mr. Stevens :—

"Voted that the purchase of the Metcalf water power and land on the Chicopee river be approved."

In 1894, and again in 1898, Edward P. Ball, a civil engineer, was employed by the Ludlow Manufacturing Co. to make surveys of the Chicopee river and the lands adjacent, such surveys in 1898 extending up to the plaintiff's line.

75 In January, 1899, as appears in the stipulation of the parties, he was employed to make plans for the dam to be erected at Red Bridge; such plans were made and the dam was built by the Ludlow Manufacturing Co. under the direction of Ball. Ball received his orders for his work from Stevens, and at Stevens' request, he had two interviews with Roscius C. Newell at the plaintiff's Palmer cotton mill. In speaking of his negotiations for the Metcalf land, Stevens testified that it was his custom in matters of similar importance to act without consulting the directors, trusting to their ratification which they usually gave. Stevens was accustomed to communicate by telephone from Ludlow with Hubbard and Wallace in Boston almost every day, and often several times a day.

There was also evidence that Hubbard refused to take a deed to the Ludlow Manufacturing Co., and that he said on an inquiry from Wallace, that he was through with the negotiations for the Metcalf land, and that Wallace then said that he (Wallace) would buy it for the Ludlow Cordage Co., and Wallace testified that he did buy it for the Ludlow Cordage Co., with a view to its development for purposes of that corporation, and that he talked with Stevens about it. At the time when, as Wallace testified, he purchased for the cordage Co., he had been told by Stevens that there was a restriction on the land which related to the height at which a dam could be constructed thereon, and Stevens told him that one thousand or more horsepower could be developed, but he knew nothing more as to the nature or extent of the restriction and made no inquiry.

After the time that Wallace stated that this talk with Hubbard and Stevens took place, and after the date that he stated his purpose to buy the land for the Ludlow Cordage Co. had been formed, Stevens wrote a letter in the name of the Ludlow Manufacturing Co. to Metcalf, dated December 1, 1898, in which he said :—

"As just arranged with you by telephone, one of us will plan to meet you Saturday afternoon at Auburn," and the attorney of the Ludlow Manufacturing Co. did meet Metcalf at Auburn on that day and stated that he had come to consummate the sale.

It was claimed by the Ludlow Manufacturing Co., and there was evidence tending to show that the entries on its books relative to the $15,000 were erroneous, that this $15,000 was really a loan to the

Ludlow Cordage Co., that this error was discovered late in the year 1899, and that in conference between Hubbard and Wallace it was then agreed that the Ludlow Manufacturing Co. should pay the Ludlow Cordage Co. $13,000 for land conveyed to it by Metcalf flowed by the dam and that the land not flowed should be valued at $2000, and entries were made on the books of both companies to conform to this agreement. So far as appeared no action by the directors of either company was had on this agreement, before or since it was made, except the vote of the directors of the Ludlow Cordage Co. of December 20, 1898, herein set forth, but the
76 entries made in pursuance thereof still remain on the books, the balance of debit and credit between the two companies has ever since included the results of such entries, and no officer or stockholder of either company has ever objected thereto. The effect of these entries according to the books was to make the Ludlow Cordage Co. the debtor of the Ludlow Manufacturing Co. to the amount of $2000. It did not appear what use, if any, the Ludlow Cordage Co. had for its land not flowed. I cannot discover that it had any and neither defendant offered any evidence upon that point.

The Ludlow Manufacturing Co. was accustomed to make advances to the Ludlow Cordage Co. from time to time, in large and small amounts, but it was the invariable custom in other cases in which advances of money were made by the Ludlow Manufacturing Co. to the Ludlow Cordage Co. to charge interest at the end of the fiscal year computed from the date of said advances, and it was Hubbard's custom as treasurer to fix the rate of interest.

In this case he fixed no rate of interest and no interest was charged at any time upon the $15,000, or any part thereof, until the close of the fiscal year, on or about December 1, 1899, when a charge of said $2000 was made to the Ludlow Cordage Company, and the debit balance of the account as it then stood, including said charge of $2000, was struck and the rate of interest on such balance fixed and thereafter charged. This balance was struck and the rate of interest fixed in accordance with the custom existing and which had theretofore existed in the business dealings between the companies. At the time of said charge of $2000, and at all times since, the balance of said account has been in favor of the Ludlow Manufacturing Company in varying amounts exceeding $90,000. No charge of interest was made or balance struck which included as a part thereof interest on said $2000 prior to the date when said charge of $2000 was made.

In the year 1898, but prior to October, 1898, there was a meeting of the officials of the Ludlow Manufacturing Co. and the officials of the Boston & Albany Railroad Co. with respect to change of location of the tracks of the railroad. A change of the tracks was subsequently made, removing them further from the river and putting them at a greater elevation above the river, so that they might not be flowed by the head of water raised by the Red Bridge dam.

During the year 1898 Weld, one of the directors of the Ludlow Manufacturing Co., was in the company's office in Boston nearly every week, and Hubbard talked over the affairs of the company with him, but did not remember talking about the purchase of the Metcalf land.

Stevens testified that his reason for writing the letter of December 6, 1898, Exhibit 44, was that he feared his negotiations for other lands subsequently acquired by him for the Ludlow Manufacturing Co. along the river would be rendered more difficult
77 and expensive if the Metcalf sale should become known. These other lands were the lands subsequently acquired by Stevens in the name of the Ludlow Manufacturing Co., being lands flowed by the Red Bridge dam.

Wallace testified that at the directors' meeting of the Ludlow Cordage Co., December 20, 1898, at which the vote was passed approving of the purchase of the Metcalf land, he made a brief statement mentioning the price paid for said land, referring to the fact that they had been in need of room and power for several years and that he had at last been able to secure a property which, if developed, might supply their then present needs, and that after that statement the vote of December 20, 1898, was passed on his recommendation as executive officer, and so far as appears, without inquiry, further explanation or discussion.

Upon other aspects of the case, I find as follows:—

The Otis Co. has never abandoned said lower privilege and has never assented to the erection of the Ludlow Manufacturing Company's dam, or to the building of any dam which would flow the land of the Otis Co. or injuriously affect its lower privilege, or deprive it of any of said fall of 19.65 feet referred to in the 6th article of said agreement between Metcalf and the Otis Co.

There was evidence bearing upon this last finding relied upon by the defendants which was in substance that Newell had stated to Ball and Stevens that the Otis Co. had had its water privilege examined by Lockwood, Green & Co., who had reported that it was impracticable to build a dam where its lower dam is now built, and that they had abandoned building there and had put in additional wheels at their upper dam. There was some evidence tending to contradict this. I do not find that the language used was sufficient to indicate an abandonment of the privilege, and Newell had no authority on behalf of the Otis Co. to abandon it or to give any assent to the construction of the dam which would injuriously affect its lower privilege or flow any of its land.

Early in the year 1899 Stevens called on Newell and made inquiries as to the boundary line between the Metcalf land and the plaintiff's land.

In the course of the conversation Newell stated in substance that the Otis Co. had contemplated developing its power at its lower privilege; that Lockwood, Green & Co., eminent engineers, had ex-

amined the property and their report was so unfavorable that they had given it up and had put in wheels at their upper mill.

One Green, of the firm of Lockwood, Green & Co., having been employed by the plaintiff to examine and report on the best method of obtaining such additional power as was then needed by it reported on October 12, 1898, that the privilege on which the plaintiff's lower dam was erected was large, and of such capacity
78 that it would be practically impossible to make any development, without a very large expenditure. The material portions of this report are as follows:—

"At the request of Mr. Olsen, I made a visit to the Palmer mill, Three Rivers, for the purpose of looking into the question of the advisability of developing the water power below the mill and transmitting the power by electric transmission to the mill. I found by looking at the privilege that it is quite a large privilege and of such capacity that it would be practically impossible to make any development without a very large expenditure for dam, wheel pits, etc. This expenditure would be so large that you could not afford to consider for a moment the question of making such a development for the purpose of securing the small amount of power which you now need at the mill.

"I may add that it seems to me that this is a very valuable property in view of any possible extensions of your plant in the future, for you would be enabled by a full development of this power to secure a large amount of additional power at your present site, using electric transmission. For the purpose, however, of securing additional power at the present time, I feel sure that the proposition to put in a pair of wheels at the point agreed upon, would be the wisest solution of the problem."

The point agreed upon referred to in the last sentence was at the plaintiff's upper dam. After receiving this report the plaintiff put additional water wheels in its mill at its upper dam.

The Ludlow Manufacturing Co. has erected a dam across the Chicopee river at Red Bridge about two miles below the land described in the deed from Metcalf to the Ludlow Cordage Co. and separated therefrom by certain tracts of land conveyed to the Ludlow Manufacturing Co., viz: Four parcels by Green, December 15, 1891, one by Moore, September 17, 1900, one by Brothers, February 6, 1899, one by Olds, June 15, 1899, one by Holbrook, September 27, 1900, and one by Talmadge, February 23, 1899, which said dam raises the water more than 21.32 feet on the land conveyed by Metcalf between the upper and lower boundary lines thereof, that is to say, between the location of the stake mentioned in the 2d article of said agreement and the lower line of said Sprague lot, in that said dam raises the water of said river between said lines 12.88 feet above the point to which it would be raised to afford the fall of 21.32 feet mentioned in the 6th article of the agreement between Metcalf and the Otis Co.

Stevens intentionally refrained from informing the Otis Com-

pany, or Newell, that the Ludlow Manufacturing Co. intended to build a dam which would flow the land of the Otis Co. and injuriously affect its lower privilege until April 11, 1900, when he sent Ball, the engineer of the Ludlow Manufacturing Co., to see Newell, and Ball informed Newell that the Red Bridge dam when completed would flow and destroy the lower privilege. This information was given by the direction of Stevens in consequence of a direct inquiry of Newell made April 7, in which Newell asked Stevens how high they intended to build their dam or how far back they in-
79 tended to flow. In reply to this inquiry Stevens said that the matter was in the hands of the engineer and that he would send him over to give the information to Newell. There was no fraudulent statement by the Ludlow Manufacturing Co. or its officers or agents with respect to its purpose of constructing a dam.

It was the purpose and intention of the Ludlow Manufacturing Co., or those having its affairs in charge, not to communicate or inform the Otis Co. of its intention to build a dam which would flow the land or privilege of the Otis Co. and this purpose and intention were not abandoned until April 11, 1900. The Ludlow Manufacturing Co. claimed that the filing of its plans with the county commissioners was notice to the Otis Co. of its intention to build such dam as was afterwards constructed by it, but I ruled the contrary.

Neither the Otis Co. nor any employee thereof had knowledge or notice prior to April 4, 1900, that any one intended to erect a dam which would flow land of the Otis Co. or injuriously affect its lower privilege or deprive it of any of its said fall of 19.65 feet referred to in the 6th article of that agreement. The first knowledge or notice that the Otis Co. or any officer or person in its employment had that it was intended by any one to erect such a dam was the knowledge or notice that might or would be inferred from the letter received April 4, 1900, by Newell, from J. K. Barker, which was as follows:—

SPRINGFIELD, MASS., April 3, 1900.

Mr. R. C. Newell, Three Rivers, Mass.

DEAR SIR: You may have heard that the Ludlow Co. has submitted plans and specifications of its proposed new dam at Red Bridge to the county commissioners for their approval. I saw the plans this afternoon and they call for a dam 48 feet high above extreme low water, or some 33 feet above the railroad at the site of the dam.

Yours truly, J. K. BARKER.

When the county commissioners approve the plans of the Ludlow Co. will this complete the appropriation of the power?

This letter was received by Newell on April 4, 1900, and its contents communicated by Newell to Mr. Olsen of the firm of Bliss, Fabyan & Co. at Boston, orally, on April 4.

The Otis Co. knew in the fall of 1899, that the Ludlow Manufact-

uring Co. were engaged in the work preparatory and necessary for the erection of a dam upon the site of the Red Bridge dam.

From the fall of 1899 the work which was being done by the Ludlow Manufacturing Co. at the site of its dam could be plainly seen by a person passing along on the highway, and said work was at all times from August, 1899, visible from the railroad track.

Bliss, Fabyan & Co. were the authorized agents and man-
80 agers of the plaintiff. Their acts in behalf of the plaintiff were the acts of the plaintiff; their knowledge was the knowledge of the plaintiff and notice to them, or to Mr. Olsen of that firm, was notice to the plaintiff.

The Ludlow Manufacturing Co. did not have knowledge or notice of any intention on the part of the plaintiff to build a dam at its lower privilege until April 27, 1900, when it received a letter from Newell stating that the plaintiff had intended for some time to construct a dam and erect a mill at its lower privilege and stating that "the work is now in progress." But Stevens had been informed by Newell on March 24 and April 7, 1900, that the plaintiff was "thinking of developing its water power" at its lower privilege. At the date of the receipt of this letter of April 27 the Ludlow Manufacturing Company understood that such dam would be flowed by the Red Bridge dam.

There was evidence as to the condition and progress of the work on the Ludlow Manufacturing Co. dam apart from the preparatory work, bearing on the findings as to knowledge and notice of and to the plaintiff, but such work on April 4, 1900, had progressed only to the extent of making as a part of the tail race an excavation from 8 to 10 feet deep, about 25 to 30 feet long and 12 to 15 feet wide, and of stripping some of the soil at the sides of the dam. The excavation in question was begun August 3, 1899, and the work of stripping the soil was commenced March 30, 1900, and completed some time between the first and fourteenth days of the following June, and was not sufficient to indicate to a person not an engineer experienced in the construction of dams the height of the proposed dam or the extent to which it would set back the water of the stream.

The work of construction of the plaintiff's dam did not begin until August 11, 1900.

It appears that the plans for the Red Bridge dam were completed in January, 1900, and that they were delivered by Ball to Stevens completed on or about January 4, 1900; that Ball had been making plans for several months prior to that time, and that blue prints of plans were generally at the Boston office of the Ludlow Manufacturing Co. when Ball was there.

In 1899 and 1900 Ball went to the office of the Ludlow Manufacturing Co. and met some of the directors there on September 22, November 2, December 9 and December 21, 1899, and on February 21, 1900. Among those whom he saw there on some or all of these occasions were Stevens, Hubbard, Weld, Bowditch and Wallace, all

of whom except Stevens were directors of the Ludlow Manufacturing Co.

The Ludlow Manufacturing Co. on March 30, 1900, filed with the county commissioners plans and specifications of its proposed dam, and these plans and specifications were approved by the county commissioners April 13, 1900.

The dam as actually constructed was six feet thicker than indicated by the plans and specifications, and there were other
81 departures in construction from the plans and specifications, but such changes rendered the dam more strong and secure and such changes seem to me to be immaterial in this cause.

The Otis Co. filed its plans and specifications with the county commissioners June 7, 1900, which were then duly approved by the commissioners.

It was claimed by the Ludlow Manufacturing Co. that such plans and specifications of the Otis Co. show that they were not in compliance with chapter 120 of the Public Statutes and the plaintiff made the same claim with reference to the plans and specifications of the dam of the Ludlow Manufacturing Co., but I deem that the determination of these claims is immaterial in this cause and make no finding thereon. Such plans and specifications and certain other additional plans and specifications were introduced in evidence and may be referred to.

The record of the county commissioners with reference to the plans and specifications of both the Ludlow Manufacturing Co. and the Otis Co., contains this language :—

"And the commissioners having inspected the work during its progress and it appearing that the said plans and specifications have been faithfully adhered to, it is ordered that the same be recorded."

The dam of the Otis Co. at its lower privilege floods a portion of what was a public highway until such highway was relocated by the county commissioners; such relocation was made September 14, 1900.

The plaintiff introduced (subject to the objection of the Ludlow Manufacturing Co.) evidence tending to show knowledge and notice on the part of the Ludlow Manufacturing Co. of an intent of the Otis Co. with respect to the development of its water power, and the condition and progress of the work upon its dam and the dam of the Otis Co. at various times, claiming the same to be competent upon the question of the remedy to which the plaintiff might be entitled and upon the question of the constitutionality of chapter 190 of the Public Statutes.

The evidence as to the knowledge of the Ludlow Manufacturing Co. of the intent of the Otis Co. to construct its dam has already been stated in part. It further appeared that in August, 1900, and prior to the 17th of that month, the Ludlow Manufacturing Co. knew that the Otis Co. was engaged in the work of constructing the dam at its lower privilege under the claim that if the Otis Co. completed that dam before the Red Bridge dam was completed, the Ludlow

Manufacturing Co. would not have the right to flow out the Otis Co.'s lower privilege by a dam completed later.

The evidence as to the condition and progress of the work of the Otis Co. dam from time to time now seems to me immaterial in view of the stipulation of the parties that the work on both dams was prosecuted and carried to completion with reasonable diligence, and in view of the facts that the time when the Ludlow Manufacturing Co. knew of the intent of the Otis Co. to develop its power is fixed by the letter of Newell to the Ludlow Manufacturing Co. as of April 27, 1900, when no work of construction had been done by the Otis Co., that the dam of the Ludlow Manufacturing Co. would flood any dam that might be constructed at the site of plaintiff's lower dam, and since the date of beginning and completion of both dams is fixed without controversy. Without attempting to state in detail the evidence as to the condition and progress of the work on the dam of the Ludlow Manufacturing Co. apart from the preparatory work, I found that it was as follows: On April 4, 1900, as has already been stated. On April 27, 1900, such work had further advanced only in respect of the work of removing and stripping the soil. On August 5, 1900, such work had proceeded to the following extent: tail race had been excavated for several hundred feet to a depth of five feet; the excavation for the core wall of the south dike had proceeded to some extent and the earth removed from the core wall trench was being used to build up the dike, but the work had not proceeded sufficiently to build the dike up above the natural surface of the ground before the soil was stripped. The excavations for the core wall in the bed of the river had progressed to some extent. The trench for the core wall for about ninety feet in length was in process of excavation. On the south side excavations of raceway and iceway were also then in progress.

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On September 8, 1900, the laying of the stone work of the dam was begun. September 20, 1900, no part of the stone work of the rollway had been laid, and no portion of the dam had been brought above the natural surface of the ground or of the stream, excepting that the earth from the excavations of the trench from the core wall on the south side had been piled up three feet high on one side and eight feet high on the other side of the trench to form the dike.

The contract between the Ludlow Manufacturing Co. and the contractor for the construction of its Red Bridge dam contained the following stipulations viz.:—

"The contractor is to furnish all labor and material for and build a stone and earth dam across the river, stone bulkhead, canal, head gates, wasteweir, iceway, brick power house, raceway and road, in accordance with plans marked 'Red Bridge dam,' dated—"

"The dam is to be built partly of masonry and partly of earth, approximately on the lines shown; but if the character of the materials or circumstances arise which render it advisable to change the location of the dam or to change the plans of the dam, the company expressly reserves the right so to do without payment of dam-

ages to the contractor, but all work actually completed will be paid for as per price bid for the whole work."

"The masonry portion of the dam will be about three hun-
83 dred feet in length and will be a solid mass of masonry faced on the downstream side with range stone laid in courses."

"The work to be done, in a general way, consists in stripping the site of the dam; building up the embankment in layers, and in paving or otherwise protecting their surfaces; doing all blasting, excavating, filling, rock and timber work; constructing all masonry; building in all iron work in connection with brick or other masonry; laying pipes through dam; doing all carpenter work in connection with bulkhead house, head gates and power house; provide all necessary cofferdams; doing all pumping or other temporary work in connection with the permanent work, and deliver over to said company the whole work in a complete condition with the masonry all pointed and with the dam, bulkhead, canal, wasteway, wheel pits, tail race and road ready to be put into service in accordance with the plans and these specifications."

"All the work during its progress and on its completion must conform truly to the lines, grades and levels to be determined and given hereafter by the engineer, and due facilities and such assistance and materials as he may require must be furnished by the contractor without extra charge, and the engineer's marks must be carefully preserved. The work must also be built in accordance with the plans and directions which shall be given by him from time to time, subject to such modifications and additions as said engineer shall deem necessary during the prosecution of the work, and in no case will any work which may be performed, or any material furnished in excess of the requirements of this contract or of the plans or of the specifications be estimated and paid for, unless such excess shall have been ordered by the company as hereinafter set forth."

"The foundation work for the stone dam, core walls of dam and for other structures is to be extended to such depth and in such a manner as shall be ordered by the engineer."

"The position of the bed rock being uncertain it is impossible to indicate the bottom of the core wall with accuracy, and it is distinctly understood that the lines for the foundation shown on the plans are not guaranteed by the company to be correct."

"Should it be found desirable by the company to make alterations in the form or character of any of the work, the said company may order such alterations to be made, defining them in writing and drawings, and they shall be made accordingly; provided, that in case such changes increase the cost of the work, the contractor shall be fairly remunerated; and in case they shall diminish the cost of the work, proper deduction from the contract price shall be made; the amount to be paid or deducted to be decided by the engineer."

"The said contractor further agrees that if the work to be
84 done under this agreement shall be abandoned, or *if this contract shall be assigned by the said contractor* otherwise than as herein specified, or if at any time the engineer shall be of the opinion, and shall so certify in writing to the said company that the said work is unnecessarily or unreasonably delayed, or that the said contractor is wilfully violating any of the conditions or agreements of this contract or is not executing said contract in good faith, or is not making such progress in the execution of the work as to indicate its completion within the required time, the said company shall have the power and right to notify the said contractor to discontinue all work, or any part thereof, under this contract; and thereupon the said contractor shall discontinue said work or such part thereof as said company may designate; and the said company shall thereupon have the power, by contract or otherwise, as it may determine, to employ such and so many persons, and to obtain such animals, carts, wagons, implements and tools as the company may deem necessary; and to use such implements, tools and materials of every description as may be found upon the line of said work, both such as enter into the completed work and such as are necessarily used in and about the same in the course of construction, and to procure other materials for the completion of the same; and to charge the expense of said labor and material, animals, carts, wagons, implements and tools to the said contractor, and the expense so charged will be determined and paid by the said company out of such moneys as may be either due, or may at any time thereafter become due, to the said contractor, under and by virtue of this contract or any part thereof; and in case such expense is less than the sum which would have been payable under this contract if the same had been completed by said contractor, then the said contractor shall be entitled to receive the difference, and in case such expense shall exceed the sum which would have been payable under this contract if the same had been completed by the said contractor, then the said contractor shall pay the amount of such excess to the said company, but such excess shall not exceed the amount owed by said company under this contract at the time said contractor is notified to discontinue said work, or any part thereof, plus the amount of the bond executed by said contractor for the performance of this contract."

The contract between the Otis Company and the contractor for the construction of its dam at its lower privilege contained the following stipulations, viz:—

"It is further agreed that all additions and alterations of any kind that the owners may desire to have made to or in the work shown on the original drawings, during the execution of this contract, shall be made by the contractors, for which due allowance shall be made, and such change shall in no way affect or make void this contract."

"This provision is also to include all such changes in depth or

dimensions of the foundations, or of other parts of the work
85 from those indicated on the original plans, as may be found expedient during the progress of the work, in order to meet the natural and unforeseen conditions of the site, and still secure the prescribed limitations for safety."

"In case of the refusal or failure of the contractors after reasonable notice to prosecute the work with proper diligence, or to supply a sufficiency of skilled workmen, or of proper materials or to execute the work in a satisfactory or expeditious manner, or in case of any other violation of this contract, then if the said architects and engineers shall certify that such refusal, failure, or violation is sufficient grounds for such action, the owners shall be at liberty after three days' notice in writing to the said contractors of *his* intention so to do, to provide any such labor or materials as the architects and engineers may advise, deducting the cost thereof from any money then due or thereafter to become due under this contract; or they may terminate the employment of said contractors on all of said work, and take possession of all materials thereon, and employ any such person or persons to finish the work and provide the proper materials therefor, as required under this contract. And in case of such debarment of said contractors and assumption of work by the owners, then the contractors shall not be entitled to receive any further payments under this contract until the said work shall be wholly finished, but the said contractors shall be indebted to the said owners for all expenses incurred thereby, or for any damage sustained through such default, and the amount of such expense and damage may be retained by said owners, out of the unpaid balance of the amount stipulated herein to be paid the said contractors."

On the second day of August, 1900, R. C. Newell wrote and sent by mail to Lockwood, Greene & Co. a letter of which the following is a copy :—

EXHIBIT 179.

Palmer Mill.

THREE RIVERS, MASS., Aug. 2, 1900.

Messrs. Lockwood, Greene & Co., Boston.

GENTLEMEN: Referring to conversation with your Mr. Harris today and the telegram from Mr. Greene which you telephoned us as follows:

"Advise Newell, also Olsen, that we will furnish all plans and specifications, and assume all responsibility for good work for 4 per cent. on full cost of complete work, and $150 per month for superintending engineer, or will do all for 5 per cent. of completed work and we will furnish superintendent."

We accept the first proposition, and place the matter in your hands on the basis of 4 per cent. of cost of work completed and $150 per

month for superintending engineer. In case operations are
86 suspended, or terminated, at any point before the complete execution of the plans, you are to make such allowance from this basis as will be reasonable and satisfactory to us.

You are to arrange for all contracts in this connection subject to our approval, and assume all responsibility for good work and prompt execution, within such time as shall fully protect our interests with which you are entirely familiar. It is understood that all contracts for labor and materials are to be made on such basis that they may be suspended, or terminated, at any point at our option.

We understand that your men are already at work on detail plans, as the writer arranged with Mr. Shedd, and that no time will be lost in getting men on the ground to begin active operations.

Yours truly, R. C. NEWELL, Supt.

The defence offered in evidence six letters written some by Newell to Bliss, Fabyan & Co., and some by Bliss, Fabyan & Co. to Newell. The plaintiff objected to these letters, but I admitted them. Copies of the letters are as follows:—Exhibits 163, 162, 165, 164, 165, 167:—

EXHIBIT 163.

Bliss, Fabyan & Co., 100 Summer Street.

BOSTON, April 5, 1900.

R. C. Newell, Esq., supt. Palmer mill.

DEAR SIR: One of the points which we wish to be satisfied about in this question of the flowage from the dam that the Ludlow Company contemplates is to ascertain by a survey just how far up the water from such a dam would flow towards your wheels of the present mill, so as to know what leeway there would be between your present raceway and the highest point that the water of the dam would flow to.

Another point that would also seem to be well to ascertain from Mr. Gardner would be if it would not answer every purpose to preserve our privilege if we were to put in a dam only 5 or 6 feet high and establish a saw mill or any other cheaply constructed mill, so that we could limit the amount of expense there to a minimum sum until such time as we saw fit to enlarge our dam and privilege for the transmission of electricity or other purposes.

It seems to the writer that our main purpose at the present time should be to preserve our privilege at the smallest expense possible, and then having done so whether that would not establish our rights for all time to put up any structure and dam of any size we saw fit, so as to develop the water power to its fullest extent, if we should some time wish to do so.

Yours truly, BLISS, FABYAN & CO.

87 EXHIBIT 162.

Palmer Mill (of the Otis Company).

THREE RIVERS, MASS., April 6, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: Your favor of the 5th inst. is received.

There is say 40.97 feet fall from our present raceway to the lower line of the Metcalf privilege. There is a fall of about 13 ft. from that point to the point quite a little below the proposed site for the Ludlow Co.'s dam, as the writer once ascertained by personally assisting in taking the levels. As we remember it, we think there may be say 3 or 4 feet of this 13 ft. fall below the location of the dam. The plans and specifications filed by the Ludlow Company with the county commissioners call for a dam 48 feet high.

Perhaps this may afford the information sufficient for your present purpose, but we shall be pleased to have an engineer go over it again if you wish exact figures. The erection and maintenance of a saw mill, or any other "mill" of cheap construction with a low dam just sufficient to afford necessary power for operation would preserve our rights. Of course the location would be so made as to discharge the water from the wheel at the lowest point or our lower line. The writer's present impression is that this may perhaps serve the greatest purpose, but will advise you further with approximate estimate of cost as soon as the sufficient data can be collected. Meantime we are engaged in the preliminary work necessary to protect our interest.

Yours truly, R. C. NEWELL, Supt. G.

Dictated by R. C. N.

EXHIBIT 164.

APR. 7, 1900.

R. C. Newell, Esq., supt. Palmer mills.

DEAR SIR: In reference to the building of a dam at Three Rivers on the Otis Company's privilege, we are all unanimously of the opinion that something should be done to preserve our rights, and that a timber dam should be started as soon as possible, somewhat in accordance with the suggestions made of a dam 6 or 10 feet high, so as to get it in at the earliest possible moment with the least delay and expense. In a letter from Mr. Baker this morning he says that it is probable that you have timber enough on the Otis property at Three Rivers that would be available for the timbers of the
88 dam that would answer the purpose for our immediate needs, and we ought to hasten the making of the plans as soon as possible, and if the laws require the filing of any plan with the

county commissioners, that we should get ready to do so at the earliest moment.

We only write this preliminary so that you may take such steps in advance as you may think best until you get definite and official orders to go ahead, in the meantime, of course, submitting your plans for approval here.

Yours truly, BLISS, FABYAN & CO.

Probably it may be best to make plans for a 10-foot dam, as the additional cost could not be very much and might answer the purpose for a longer time.

EXHIBIT No. 165.

Palmer Mills (of the Otis Company).

THREE RIVERS, MASS., April 10, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: Your favor of the 7th inst. with reference to new dam is received.

As we advised you last week, we are having the preliminary work done, and hope to have sketches to submit to Mr. Greene with reference to location early next week.

The writer met Mr. Stevens, the agent of the Ludlow Company, Saturday, and in conversation with him asked how far back they intended to flow. He replied by saying that he would have their engineer come and look it over with us, and the writer responded that we would be glad to have him do so.

We will endeavor to keep you fully advised in this connection.

Yours truly, R. C. NEWELL, Supt.

As we suppose Mr. Stevens sailed for England yesterday we hardly expect to see their engineer right away.

EXHIBIT No. 166.

Palmer Mill (of the Otis Company).

THREE RIVERS, MASS., April 7th, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: We enclose letter from Messrs. Gardner & Gardner confirming ours of yesterday with reference to the protection of our lower mill privilege.

Yours truly, R. C. NEWELL, Supt.

(Enclosure.)

89 EXHIBIT No. 167.

Palmer Mill (of the Otis Company).

THREE RIVERS, MASS., April 25th, 1900.

Messrs. Bliss, Fabyan & Co., Boston.

GENTLEMEN: Referring to Mr. Olson's suggestion today about voting the construction of the dam, etc., at our lower mill privilege.

It seems to me that, in view of circumstances which may arise, it is desirable to have the vote include approval of the work already done, or that it may be so worded as to refer to a work already begun and in process. We did begin actual work some weeks ago, and it seems to me desirable that as early a date as possible should be maintained. Doubtless this may have occurred to you, but I trust this suggestion may not be deemed out of place.

Yours truly, R. C. NEWELL, Supt.

Such determination as was made by the plaintiff on April 4 to erect a dam was for the purpose of preventing the appropriation by the defendant Ludlow Manufacturing Company under its prior determination, and did not comprehend the dam subsequently erected by the plaintiff.

No determination of the plaintiff on April 4 to erect a dam was arrived at until after notice to it of the Ludlow Manufacturing Company's determination to erect a dam which would cause the plaintiff's dam and alleged mill site to be flooded to substantially the extent to which the present dam of the Ludlow Manufacturing Company is capable.

On the 26th of April, 1900, the directors of the Otis Co. passed the following vote:—

"*Voted:* That the treasurer of this corporation continue the work of survey and plans for the construction of a dam on the water privilege owned by this company on the Chicopee river about one mile below the present site of the Palmer mill at Three Rivers, and proceed with the construction of such dam as soon as practicable, of such construction and dimensions as in his judgment may be deemed best. Also erect a building or buildings at or near said dam and water privilege for the purpose of utilizing the water power to be developed by said dam."

The average total net twenty-four hour flow of the dryest month of an average year gives at the plaintiff's dam, with a net head of 18 feet, 514.24 horse-power on the water wheel shafts, and no more, as contended by the defendant, or 560 horse-power on the
90 water wheel shafts, and no more, as contended by the plaintiff, and the average total net twenty-four hour flow of the dryest month of the average year, if used in ten hours with the same

head, would give at the plaintiff's dam 1234 horse-power on the water wheel shafts, and no more, as contended by the defendant, or 1344 horse-power on the water wheel shaft, and no more, as contended by the plaintiff.

The plaintiff claimed and offered to show in each instance that the power so given would equal the larger amount, and the defendant claimed and offered to show in each instance that it would not exceed the smaller amount. The master, deeming this evidence immaterial for the purposes of this case, excluded the evidence offered by each. Each party excepted to the exclusion of the evidence offered by it, and if the evidence excluded is material on the question of the right of the plaintiff to maintain the bill, and if either of the parties is injured by its improper exclusion, the case is to be recommitted to the master for further hearing and findings on the questions raised by said offers.

The plaintiff claimed and offered to prove that the defendant had sufficient water and steam power for the present and future working of its mills without raising the waters of the stream so as to affect the plaintiff; and the defendant claimed and offered to prove that, in addition to its present power, the defendant needed for the present and future working of its mills all the power that can be developed by its said dam. The master excluded the evidence offered by each, on the ground that it was immaterial. Each party excepted to the exclusion of the evidence offered by it.

The defendant claimed and offered to prove that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said dam. And the plaintiff claimed and offered to prove that, in addition to its present water and steam power, it needed, for the present and future working of its mill, all the power that can be developed by its said dam.

The master excluded the evidence offered by each on the ground that it was immaterial. Each party excepted to the exclusion of the evidence offered by it.

If the evidence excluded is material on the question of the plaintiff's right to maintain its bill, and if either of the parties is injured by its improper exclusion, the case is to be recommitted to the master for a further hearing, and findings on the question raised by said offers.

No evidence was introduced by either party to show the cost to the defendant of cutting down its said dam to a point thereof so that the remainder left after such cutting down would not raise the waters of the river so as to reduce the head of water created by plaintiff's dam, and interfere with the operation of plaintiff's water wheels; and no evidence was introduced by either
91 party to show the amount of damages which the defendant's dam will cause the plaintiff if maintained, and no finding is made upon these points. If such evidence shall be deemed material

to the decision of this case, then the case is to be recommitted to the master for further hearing on these points.

The plaintiff requested me to find and report the date when the Ludlow Manufacturing Co. first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes, viz.:—

"Nor shall a mill dam be erected or raised to the injury of any such mill site which has been occupied as such by the owner thereof if such owner within a reasonable time after commencing such occupation completes and puts in operation a mill for the working of which the water of such stream is applied."

I find that this date was August 3, 1899,—the date stated in the stipulation of the parties as the date when it began the construction of its dam.

The plaintiff requested me also to find and report the date that the Ludlow Manufacturing Co. first occupied the Red Bridge site as a mill site, within the meaning of the above-quoted clause of the statute, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site.

It appears by the stipulation of the parties that the Ludlow Manufacturing Co. in January, 1899, employed Ball to make surveys, cross sectionings, soundings, plans and estimates necessary for the erection in a completed form on the Red Bridge location of a mill dam and other structures, and to do such other acts and things as would be necessary for the proper development of the water power on said mill site.

It further appears in the stipulation that immediately thereafter the Ludlow Manufacturing Co., having determined on the present height and site of the dam, said Ball and the agents and employees of the Ludlow Manufacturing Co. commenced the work of preparation for the building of the dam and structures and making the development and prosecuted the work of preparation for and the building of the dam and structures and making the development continuously and with due diligence to the completion thereof within a reasonable time.

It further appears in said stipulation that the Ludlow Manufacturing Co. began its dam by commencing the construction of the tail race thereof on August 3, 1899. I find that the date last above requested by the plaintiff was August 3, 1899.

The plaintiff requested me also to find and report the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Co. within the meaning of said clause after it had determined upon the height of the Red Bridge dam.

Referring again to the stipulation and to the evidence in the case, I find that the first act of occupation was the excavation of the tail race which began on August 3, 1899.

92 It is agreed by the parties that such of the exhibits used before me as either party desires may be referred to.

The plaintiff requested me to rule:—

1. That said clause of the statute does not authorize the owner of a mill site, who has first commenced to occupy it as such by first preparing to erect, or by first commencing to erect a mill dam, and who builds and puts in operation a mill in accordance with said clause, to complete the erection of such dam and thereby raise the waters of the stream so as to flow and injure an upper mill site on said stream, the owner of which upper mill site had first completed thereon the erection of a mill dam and thereby raised the waters of said stream and used them in working a water mill before the lower dam was completed or used to raise said water.

2. That if said section 2 does authorize the owner of such lower mill site to flow and injure an upper mill site, under the circumstances stated in the last stated request, then said section is in violation of the Constitution of the United States and of the constitution of Massachusetts.

3. That the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell, dated April 30, 1900.

4. The plaintiff's dam does not violate any of the common law rights of either of the defendants.

5. The letters between Newell and Bliss, Fabyan & Co., admitted in evidence *de bene*, are immaterial and should be excluded.

6. The action of the county commissioners in the petition to relocate the highway was a valid discontinuance of the old highway, and the deeds from Dunn conveyed to the plaintiff the land described therein.

I gave the 3d, 4th and 6th requests, and refused to give the 1st, 2d and 5th.

The defendants requested the following rulings:—

1. Upon the facts found and agreed and the law in the case, the appropriation by the Ludlow Manufacturing Company of the power comprehended by its present development at Red Bridge was prior to any appropriation by the Otis Company at its so-called lower privilege.

2. Upon the law and the facts found and upon the facts agreed to, the Ludlow Manufacturing Company first occupied its mill site as such.

3. Prior to the time the Otis Company commenced the erection of its dam, the mill site of the Ludlow Manufacturing Company had been occupied as such by said Ludlow Manufacturing Company.

93 4. The mill dam of the Ludlow Manufacturing Company was begun before any occupancy by the Otis Company of its alleged mill site or so-called lower privilege.

5. The Ludlow Manufacturing Company, within a reasonable time after the commencement of its said occupation, completed and

put in operation a mill for the working of which the water of the said Chicopee river was applied.

6. The alleged plans filed with county commissioners of Hampden county by the Otis Company were not such as are contemplated by Pub. Stats., chap. 190.

7. The dam of the Otis Company was not built in substantial accordance with the alleged plans filed by it with the county commissioners.

8. The dam of the Otis Company was not built in substantial accordance with the alleged specifications filed by it with the county commissioners.

9. Nothing contained in the so-called Metcalf agreement prohibited the Ludlow Manufacturing Company from erecting and maintaining its present dam and the flowage occasioned thereby.

10. The alleged Metcalf agreement contemplated only that Metcalf or his assigns should not construct a dam on the so-called Metcalf tract which should afford more than twenty-one and thirty-two hundredths (21 32/100) feet fall and could not prohibit the erection by the Ludlow Manufacturing Company of a dam upon its land substantially two miles below, where its said dam has been erected.

11. Inasmuch as in the deed from Metcalf to the Otis Company, and in the deed from the Otis Company to Metcalf, no reference was made to the alleged Metcalf agreement or any of its provisions and inasmuch as in each of said deeds there was a covenant with the grantee named therein and his heirs and assigns that the granted premises were free from all incumbrances made or suffered by the grantor named therein, after the delivery of said deeds the so-called Metcalf agreement became inoperative and ceased to be effective between the parties thereto.

12. Inasmuch as in the deed from Metcalf to the Otis Company, and in the deed from the Otis Company to Metcalf, no reference was made to the alleged Metcalf agreement or any of its provisions, and inasmuch as in each of said deeds there was a covenant with the grantee named therein and his heirs and assigns that the granted premises were free from all incumbrances made or suffered by the grantor named therein, after the delivery of said deeds the so-called Metcalf agreement could not operate to prevent the Ludlow Cordage Company from erecting a dam upon the land deeded by Metcalf to it, of dimensions such as would afford more than 21 32/100 feet fall.

13. Inasmuch as in the deed from Metcalf to the Otis Company, and in the deed from the Otis Company to Metcalf, no reference was made to the alleged Metcalf agreement or any of its provisions, and inasmuch as in each of said deeds there was a covenant
94 with the grantee named therein and his heirs and assigns that the granted premises were free from all incumbrances made or suffered by the grantor named therein, after the delivery of said deeds the so-called Metcalf agreement could not operate to

prevent the Ludlow Manufacturing Company from erecting a dam upon its land at the site of the present Red ridge-dam and of the dimensions of its present dam.

14. If the Ludlow Manufacturing Company had knowledge of the contents of the alleged Metcalf agreement, it would not be prevented thereby from erecting a dam upon its land, which is the site of its present dam and of the dimensions of its present dam.

15. Even if the defendant Ludlow Manufacturing Company did for its own benefit and use purchase of said Metcalf the land conveyed by him to the Ludlow Cordage Company, and if the Ludlow Manufacturing Company and the Ludlow Cordage Company, one or both, at the time of said purchase had knowledge of the contents of the alleged Metcalf agreement, said Ludlow Manufacturing Company would not be prevented thereby from erecting a dam upon its land which is the site of its present dam and of the dimensions of the present dam.

16. Even if the deed to the Ludlow Cordage Company was taken by it with knowledge of the terms of the Metcalf agreement, and for the benefit and use of the Ludlow Manufacturing Company, said Ludlow Manufacturing Company was not prohibited from erecting and maintaining its present dam and thus creating and maintaining the flowage occasioned thereby.

17. Even if said land described in the deed from Metcalf to the Ludlow Cordage Company did legally or in equity belong to or was the property of the Ludlow Manufacturing Company, said Ludlow Manufacturing Company was not prevented thereby from erecting a dam upon the tract of land which is the site of its present dam and of the dimensions thereof.

18. Said land so described does not belong to and is not the property of the Ludlow Manufacturing Company.

19. Even if the Ludlow Cordage Company, before the time of the purchase of said land from Metcalf and the delivery of the deed from Metcalf to it, did have knowledge of the terms of the alleged agreement between Metcalf and the Otis Company, it would not thereby be prevented from the erection of a dam upon the said Metcalf tract of the dimensions of the present dam of the Ludlow Manufacturing Company.

20. Even if the Ludlow Manufacturing Company, before the time of the purchase of said land from Metcalf and the delivery of the deed from Metcalf to the Ludlow Cordage Company, did have knowledge of the terms of the alleged agreement between Metcalf and the Otis Company, it would not thereby be prevented from the erection of a dam upon the tract of land which is the site of its present dam and of the dimensions thereof.

95 21. Whatever knowledge Stevens may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of said Cordage Company, nor was it binding upon said company.

22. Whatever knowledge Stevens may have possessed prior to the

delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of the Ludlow Manufacturing Company, nor was it binding upon said company.

23. Whatever knowledge Hubbard may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of said Cordage Company, nor was it binding upon said company.

24. Whatever knowledge Hubbard may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of the Ludlow Manufacturing Company, nor was it binding upon said company.

25. Whatever knowledge Wallace may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of said Cordage Company, nor was it binding upon said company.

26. Whatever knowledge Wallace may have possessed prior to the delivery of the deed from Metcalf to the Ludlow Cordage Company was not the knowledge of the Ludlow Manufacturing Company, nor was it binding upon said company.

27. The purchase of said land from Metcalf and the taking of a deed thereof by the Ludlow Cordage Company were not acts in fraud of any legal rights of the plaintiff.

28. In failing to commence its proceedings before the completion of the Ludlow Manufacturing Company's dam, the plaintiff was guilty of laches.

29. "Said Ludlow Manufacturing Company did not, for its own purpose, purchase of said Metcalf the land conveyed by him to the Ludlow Cordage Company, and is not the legal and equitable owner of the land so purchased."

30. "The Ludlow Manufacturing Company neither at nor before the delivery of the deed from Metcalf to the Ludlow Cordage Company had any knowledge of said alleged agreement between Metcalf and the plaintiff, and neither did it have knowledge at or before said delivery of said deed that Metcalf or his assigns had no right to construct a dam in the development of the water power of said river which would develop more than 21.32 feet fall on the land conveyed by Metcalf to the Ludlow Cordage Company, or which would raise the water of said river to a greater hight than the copper bolt set by the plaintiff and said Metcalf."

31. "The Ludlow Manufacturing Company was not and is not the legal and equitable owner of the land conveyed by Metcalf to the Ludlow Cordage Company. The Ludlow Cordage Company purchased said land in its own name and for its own purposes, and in so doing there was no attempt or intention on its part to
96 conceal the real ownership of said land, legal or equitable, or make it appear that said Ludlow Manufacturing Company was not in law or equity an assign of said Metcalf, or that said Ludlow Manufacturing Company was not in law or equity bound by the

alleged covenants, agreements and restrictions contained in said Metcalf agreement."

32. In the purchase of said land by the Ludlow Cordage Company, the Ludlow Manufacturing Company did not participate in any attempt or intent to conceal the real ownership of said land, legal or equitable, or to make it appear that it was not in law or equity an assign of said Metcalf, or that it was not in law or equity bound by the alleged covenants, agreements or restrictions contained in said Metcalf agreement.

33. The title of the Ludlow Cordage Company to the lands described in said deed to it from Metcalf is absolute in it and is not colorable.

34. The Ludlow Cordage Company, before the time of the purchase of said land from Metcalf and the delivery of a deed from Metcalf to it, had no knowledge of the terms of the alleged agreement between Metcalf and the Otis Company, nor of any alleged covenants, easements or restrictions thereby claimed to be created.

35. In the purchase of said land from Metcalf and in the taking of a deed thereof by the Ludlow Cordage Company it did not participate in any purpose of enabling the Ludlow Manufacturing Company to really own and control the land comprehended thereby or evade the terms of said Metcalf agreement.

36. "Upon the pleadings and the evidence the plaintiff is not entitled to any relief."

37. "The allegations contained in the plaintiff's bill are not sustained."

Of these rulings I gave the 1st, 2d, 3d, 4th, 5th, 9th, 14th, 15th, 16th, 17th and 20th.

I gave the 27th in this form:—

27. The purchase of said land from Metcalf and the taking of a deed thereof in the name of the Ludlow Cordage Co., were not acts in fraud of any legal rights of the plaintiff.

I declined to give the 6th, 7th, 8th, 10th, 11th, 12th, 13th, 18th, 19th, 21st, 22d, 23d, 24th, 25th, 26th, 28th, 29th, 30th, 31st, 32d, 33d, 34th, 35th, 36th and 37th. In lieu of the 36th and 37th I gave the following:—

Upon the facts found and agreed, I rule as matter of law that the plaintiff is not entitled to any relief.

I consider the 10th, 19th, 21st and 23d immaterial in view of other rulings and findings, and they are not given for that reason.

The objections of the parties are appended to this report.

JAMES R. DUNBAR, Master.

Filed Dec. 10, 1903.

97 Plaintiff's Objections to Master's Report.

The plaintiff objects to the master's report because the master does not make the following findings or rulings:—

1. That said Red Bridge dam, erected by the Ludlow Manufacting Company, was erected in violation of section 2 of Public Statutes, chapter 190, to the injury of an existing water mill of the plaintiff on the same stream.

2. That said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of said section 2, to the injury of the mill site of the plaintiff on the same stream, which had been and was occupied as such by the plaintiff at the time said Red Bridge dam was erected.

3. That said lower dam of the plaintiff was not erected in violation of said section 2 to the injury of any mill site of the defendants or either of them, existing on the same stream.

4. That said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill site of the defendants or either of them, occupied as such by them or either of them.

5. That said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of the rights of the plaintiff.

6. That if said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the constitution of Massachusetts and void.

7. That if said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised,
98 and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the fourteenth amendment of the Constitution of the United States and

void, in that it authorizes depriving a person of his property without due process of law.

8. That if said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right thereafter to complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to destroy thereby the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the fifth amendment of the Constitution of the United States and void, in that it authorizes the taking of private property without just compensation.

9. That the terms and conditions of said Metcalf agreement bound the assigns of said Metcalf not to erect the Red Bridge dam at the place and in the manner in which the master finds it was erected.

10. That the Ludlow Manufacturing Company is an assign of said Metcalf within the meaning of said agreement.

11. That, by reason of the terms of said agreement and the knowledge thereof by said Ludlow Manufacturing Company at the time it purchased the land of Metcalf and took from him the deed thereof to the Ludlow Cordage Company, and by reason of the other matters and things found by the master and stated in his report, the Ludlow Manufacturing Company had no right to build and maintain said Red Bridge dam.

12. That said Red Bridge dam was erected in violation of the rights of the plaintiff and the plaintiff is entitled to relief.

13. That said Red Bridge dam was erected in violation of the plaintiff's rights and that the plaintiff is entitled to the relief sought, and is entitled to have said dam abated so that it will not be maintained to the injury of the plaintiff's mill, nor to the injury of the plaintiff's mill site, nor to the injury of the water power developed by the plaintiff as stated in the report of the master.

14. Because the master excluded the evidence offered by the plaintiff of the twenty-four hour flow, and of the twenty-four hour flow, if used in ten hours, of said stream, in the driest month of an average year, at the plaintiff's dam.

15. Because the master excluded the evidence offered by
99 the plaintiff to prove that the defendant had sufficient water and steam power for the present and future working of its mill without raising the waters of the stream so as to affect the plaintiff.

16. Because the master excluded the evidence offered by the plaintiff to prove that, in addition to the plaintiff's present water and steam power, it needed for the present and future working of its mill all the power that can be developed by its said lower dam.

17. Because the master refused to give the first ruling requested by the plaintiff.
18. Because the master refused to give the second ruling requested by the plaintiff.
19. Because the master refused to give the fifth ruling requested by the plaintiff.
20. Because the master gave the first ruling requested by the defendants.
21. Because the master gave the second ruling requested by the defendants.
22. Because the master gave the third ruling requested by the defendants.
23. Because the master gave the fourth ruling requested by the defendants.
24. Because the master gave the fifth ruling requested by the defendants.
25. Because the master gave the ninth ruling requested by the defendants.
26. Because the master gave the fourteenth ruling requested by the defendants.
27. Because the master gave the fifteenth ruling requested by the defendants.
28. Because the master gave the sixteenth ruling requested by the defendants.
29. Because the master gave the seventeenth ruling requested by the defendants.
30. Because the master gave the twentieth ruling requested by the defendants.
31. Because the master gave the twenty-seventh ruling requested by the defendants.
32. Because the master gave any of the rulings requested by the defendants.

BOYD B. JONES,
Solicitor for Plaintiff.

100 Objections of Ludlow Manufacturing Company.

This defendant makes the following objections to the master's report:—

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose and paid for with its own funds; that the existence and terms of said Metcalf agreement was at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement, and that the Ludlow Manufacturing Company is in equity

the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further objects to said report because of the admission and consideration of the evidence objected to by the defendant and by the master held to be immaterial, upon which the findings which are the subject of this objection were based.

101 2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the manufacturing company would cease to furnish power to the cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes quoted in said report on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures making said development, and prosecuted said work of preparation for and the said building of said dam and said structures

and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause of the Public Statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3, 1899, because
102 it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail race, which began on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the work of preparation for the building of said dam and said structures* and making said development and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell, dated April 30, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site, and because of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

12. To the finding of the master at the request of the plaintiff

that the action of the county commissioners in the petition to relocate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defend-
103 ants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.

22. To the refusal of the master to give the thirteenth ruling requested by the defendants.

23. To the refusal of the master to give the eighteenth ruling requested by the defendants.

24. To the refusal of the master to give the nineteenth ruling requested by the defendants.

25. To the refusal of the master to give the twenty-first ruling requested by the defendants.

26. To the refusal of the master to give the twenty-second ruling requested by the defendants.

27. To the refusal of the master to give the twenty-third ruling requested by the defendants.

28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.

29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.

104 30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.

31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.

32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.
33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.
34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.
35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.
36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.
37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.
38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW MANUFACTURING CO.,
By WILLIAM H. BROOKS,
R.,
JAMES B. CARROLL,
R.,
WALTER S. ROBINSON,
Its Attorneys.

105 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Objections of Ludlow Cordage Company.

This defendant makes the following objections to the master's report:—

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose, and paid for with its own funds; that the existence and terms of said Metcalf agreement *was* at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement and that the Ludlow Manufacturing Company is in equity the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further objects to said report because of the admission and consideration of the evidence, objected to by the de-

fendant and by the master held to be immaterial, upon which the findings which are the subject of this objection were based.

2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the manufacturing company would cease to furnish power to the
106 cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11th, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11th, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

107 7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes quoted in said report on August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the

meaning of the clause of the Public Statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

108 9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail-race, which began on August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the work of preparation for the building of said dam and said structures* and making said development, and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell dated April 30th, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site and be-

109 cause of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30th, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

12. To the finding of the master at the request of the plaintiff that the action of the county commissioners in the petition to re-locate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defendants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

110 18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.

22. To the refusal of the master to give the thirteenth ruling requested by the defendants.

23. To the refusal of the master to give the eighteenth ruling requested by the defendants.

24. To the refusal of the master to give the nineteenth ruling requested by the defendants.

25. To the refusal of the master to give the twenty-first ruling requested by the defendants.

26. To the refusal of the master to give the twenty-second ruling requested by the defendants.

27. To the request of the master to give the twenty-third ruling requested by the defendants.

28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.

29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.

30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.

111 31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.

32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.

33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.

34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.

35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.

36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.

37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.

38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW CORDAGE CO.,
By WILLIAM H. BROOKS,
R.,
JAMES B. CARROLL,
R.,
WALTER S. ROBINSON,
Its Att'ys.

112 Plaintiff's Exceptions to Master's Report.

The plaintiff excepts to the master's report because the master does not make the following findings or rulings:—

1. Said Red Bridge dam, erected by the Ludlow Manufacturing Company, was erected in violation of section 2 of Public Statutes, chapter 190, to the injury of an existing water mill of the plaintiff on the same stream.

2. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of said section 2, to the injury of the
113 mill site of the plaintiff on the same stream, which had been and was occupied as such by the plaintiff at the time said Red Bridge dam was erected.

3. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill site of the defendants or either of them existing on the same stream.

4. Said lower dam of the plaintiff was not erected in violation of said section 2, to the injury of any mill site of the defendants or either of them occupied as such by them or either of them.

5. Said Red Bridge dam was erected by the Ludlow Manufacturing Company in violation of the rights of the plaintiff.

6. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby

destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the constitution of Massachusetts, and void.

7. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to thereby destroy the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the 14th amendment of the Constitution of the United States, and void, in that it authorizes depriving a person of his property without due process of law.

8. If said section 2 provides that a riparian proprietor, by beginning to occupy his land for the erection of a dam thereon with which to raise the waters of a non-navigable stream for the working of a water mill, or by beginning to erect thereon a dam for such working, shall acquire the right to thereafter complete such dam and to thereby raise the waters of the stream and flow and injure the mill site of an upper proprietor and his existing water mill thereon
114 in actual operation at and prior to the time such lower dam is completed and the waters of said stream thereby raised, and to destroy thereby the water power of such upper proprietor developed and actually used in working said upper mill at and prior to said time,—such provision is contrary to the 5th amendment of the Constitution of the United States, and void, in that it authorizes the taking of private property without just compensation.

9. The terms and conditions of said Metcalf agreement bound the assigns of said Metcalf not to erect the Red Bridge dam at the place and in the manner in which the master finds it was erected.

10. The Ludlow Manufacturing Company is an assign of said Metcalf within the meaning of said agreement.

11. By reason of the terms of said agreement and the knowledge thereof by said Ludlow Manufacturing Company at the time it purchased the land of Metcalf and took from him the deed thereof to the Ludlow Cordage Company, and by reason of the other matters and things found by the master and stated in his report, the Ludlow Manufacturing Company had no right to build and maintain said Red Bridge dam.

12. Said Red Bridge dam was erected in violation of the rights of the plaintiff.

13. Said Red Bridge dam was erected in violation of the plaintiff's rights, and the plaintiff is entitled to the relief sought and is entitled to have said dam abated so that it will not be maintained

to the injury of the plaintiff's mill, not to the injury of the plaintiff's mill site, nor to the injury of the water power developed by the plaintiff as stated in the report of the master.

And further excepts to said report,—

14. Because the master excluded the evidence offered by the plaintiff of the twenty-four hour flow, and of the twenty-four hour flow if used in ten hours, of said stream, in the driest month of an average year, at the plaintiff's dam.

15. Because the master excluded the evidence offered by the plaintiff to prove that the defendant had sufficient water and steam power for the present and future working of its mill without raising the waters of the stream so as to affect the plaintiff.

16. Because the master excluded the evidence offered by the plaintiff to prove that, in addition to the plaintiff's present water and steam power, it needed for the present and future working of its mill all the power that can be developed by its said lower dam.

17. Because the master refused to give the first ruling requested by the plaintiff.

18. Because the master refused to give the second ruling requested by the plaintiff.

19. Because the master refused to give the fifth ruling requested by the plaintiff.

20. Because the master gave the first ruling requested by the defendants.

115 21. Because the master gave the second ruling requested by the defendants.

22. Because the master gave the third ruling requested by the defendants.

23. Because the master gave the fourth ruling requested by the defendants.

24. Because the master gave the fifth ruling requested by the defendants.

25. Because the master gave the ninth ruling requested by the defendants.

26. Because the master gave the fourteenth ruling requested by the defendants.

27. Because the master gave the fifteenth ruling requested by the defendants.

28. Because the master gave the sixteenth ruling requested by the defendants.

29. Because the master gave the seventeenth ruling requested by the defendants.

30. Because the master gave the twentieth ruling requested by the defendants.

31. Because the master gave the twenty-seventh ruling requested by the defendants.

32. Because the master gave any of the rulings requested by the defendants.

33. Because the master ruled that the plaintiff is not entitled to relief.

HURLBURT, JONES & CABOT,
CHARLES L. GARDNER,
Plaintiff's Solicitors.

Filed Dec. 18, 1903.

116 Exceptions of Ludlow Manufacturing Company to Master's Report.

This defendant excepts to the report of the master in the following respects;—

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose, and paid for with its own funds; that the existence and terms of said Metcalf agreement was at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement,

117 and that the Ludlow Manufacturing Company is in equity the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further excepts to said report because of the admission and consideration of the evidence, excepted to by the defendant and by the master held to be immaterial, upon which the findings which are the subject of this exception were based.

2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the Manufacturing Company would cease to furnish power to the cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11, 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11, 1900, because it appears that the Ludlow Manufact-

uring Company filed its plans and specifications for the erection of its said dam March 30, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause in section 2 of chapter 190 of the Public Statutes quoted in said report, on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures — making said development, and prose-
118 cuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause of the Public Statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail race, which began on August 3, 1899, because it appears in the stipulation of the parties that immediately after, some time in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the work of preparation*

for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell, dated April 30, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site, and because of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

119 12. To the finding of the master at the request of the plaintiff that the action of the county commissioners in the petition to relocate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defendants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.
22. To the refusal of the master to give the thirteenth ruling requested by the defendants.
23. To the refusal of the master to give the eighteenth ruling requested by the defendants.
24. To the refusal of the master to give the nineteenth ruling requested by the defendants.
25. To the refusal of the master to give the twenty-first ruling requested by the defendants.
26. To the refusal of the master to give the twenty-second ruling requested by the defendants.
27. To the refusal of the master to give the twenty-third ruling requested by the defendants.
120 28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.
29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.
30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.
31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.
32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.
33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.
34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.
35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.
36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.
37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.
38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW MANUFACTURING CO.,
By WILLIAM H. BROOKS,
R.,
JAMES B. CARROLL,
R.,
WALTER S. ROBINSON,
Its Attorneys.

Filed, Dec. 17, 1903.

121 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET ALS.

Exceptions of Ludlow Cordage Company to Master's Report.

This defendant excepts to the report of the master in the following respects:

1. To the finding that the land conveyed by Metcalf to the Ludlow Cordage Company was purchased by the Ludlow Manufacturing Company for its own purpose, and paid for with its own funds; that the existence and terms of said Metcalf agreement was at the date of said purchase known to said Ludlow Manufacturing Company and said deed taken in part for the purpose of concealing the ownership of said property and of evading the obligations imposed upon said Metcalf and his assigns by the sixth clause of said agreement and that the Ludlow Manufacturing Company is in equity the real owner of said property and retains title in the name of the Ludlow Cordage Company for the purposes above stated.

And this defendant further excepts to said report because of the admission and consideration of the evidence, excepted to by the defendant and by the master held to be immaterial, upon which the findings which are the subject of this exception are based.

2. To the finding that neither the Ludlow Manufacturing Company nor the Ludlow Cordage Company contemplated that the manufacturing company would cease to furnish power to the cordage company, because upon the evidence stated in the report it appears that the cordage company contemplated a development
122 of power on its own account, and that Wallace had such an intent at the time of the purchase.

3. To the finding that Stevens intentionally refrained from informing the Otis Company or Newell that the Ludlow Manufacturing Company intended to build a dam which would flow the land of the Otis Company and injuriously affect its lower privilege until April 11th 1900, because it appears that the Ludlow Manufacturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

4. To the finding that it was the purpose and intention of the Ludlow Manufacturing Company, or those having its affairs in charge, not to communicate or inform the Otis Company of its intention to build a dam which would flow the land or privilege of the Otis Company, and that this purpose and intention were not abandoned until April 11th, 1900, because it appears that the Ludlow Manu-

facturing Company filed its plans and specifications for the erection of its said dam March 30th, 1900.

5. To the refusal of the master to rule that the filing of said plans with the county commissioners was notice to the Otis Company of the intention of said Ludlow Manufacturing Company to build such dam as was afterwards constructed by it.

6. To the refusal of the master to find that the plans and specifications filed by the Otis Company with the county commissioners were not in compliance with chapter 190 of the Public Statutes, because said plans and specifications are not of the character comprehended by said statute.

7. To the finding that the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site within the meaning of the clause in section 2 of chapter 190 of the Public Statutes
123 quoted in said report on August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined upon the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of the said dam and said structures making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

8. To the finding that the time when the Ludlow Manufacturing Company first occupied the Red Bridge site as a mill site, within the meaning of the clause of the public statutes quoted in said report, after its determination to build a dam high enough to flow the plaintiff's land and injure its lower mill site, was August 3d, 1899, because it appears in the stipulation of the parties that immediately after sometime in *January 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company commenced the work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of said dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

9. To the finding that the first act of occupation of the Red Bridge mill site by the Ludlow Manufacturing Company, within the meaning of said clause, after it had determined upon the height of its dam, was the excavation of the tail-race, which began on August 3d, 1899, because it appears in the stipulation of the parties that
124 immediately after sometime in *January, 1899*, "the Ludlow Manufacturing Company having determined on the present height and present site of said dam, said Ball and the agents and employees of the Ludlow Manufacturing Company *commenced the*

work of preparation for the building of said dam and said structures and making said development, and prosecuted said work of preparation for and the said building of the dam and said structures and making said development continuously and with due diligence to the completion thereof within a reasonable time."

10. To the finding of the master at the request of the plaintiff that the only notice that the Ludlow Manufacturing Company, or any officer or agent thereof, gave to the plaintiff of its intention to erect a dam which would flow or injure the plaintiff's mill site was said communication by Ball to Newell and a letter from Hubbard to Newell dated April 30th, 1900, because it appears in the evidence stated in the report that the work which had been done by the Ludlow Manufacturing Company during the year 1898 was of such a character as to indicate to the Otis Company the fact that a dam was to be erected by the Ludlow Manufacturing Company, and that such dam would flow and injure the plaintiff's alleged mill site, and because of the filing of the plans and specifications of the Ludlow Manufacturing Company's dam with the county commissioners March 30th, 1900.

11. To the finding of the master at the request of the plaintiff that the plaintiff's dam does not violate any of the common law rights of either of the defendants.

12. To the finding of the master at the request of the plaintiff that the action of the county commissioners in the petition to re-locate the highway was a valid discontinuance of the old highway, and that the deeds from Dunn conveyed to the plaintiff the land described therein.

13. To the exclusion of the evidence offered by the defendants with respect to the amount of power afforded at the plaintiff's dam by the average flow of the stream during twenty-four hours and ten hours respectively.

14. To the exclusion of the evidence offered by the Ludlow Manufacturing Company that it needed for the present and future working of its mills, in addition to its present power, all the power which can be developed by its said dam.

15. To the exclusion of the evidence offered by the defendants that the plaintiff had sufficient water power and steam power for the present and future working of its mills without the power that can be developed by its said lower dam.

16. To the refusal of the master to give the sixth ruling requested by the defendants.

17. To the refusal of the master to give the seventh ruling requested by the defendants.

18. To the refusal of the master to give the eighth ruling requested by the defendants.

19. To the refusal of the master to give the tenth ruling requested by the defendants.

20. To the refusal of the master to give the eleventh ruling requested by the defendants.

21. To the refusal of the master to give the twelfth ruling requested by the defendants.

22. To the refusal of the master to give the thirteenth ruling requested by the defendants.

126 23. To the refusal of the master to give the eighteenth ruling requested by the defendants.

24. To the refusal of the master to give the nineteenth ruling requested by the defendants.

25. To the refusal of the master to give the twenty-first ruling requested by the defendants.

26. To the refusal of the master to give the twenty-second ruling requested by the defendants.

27. To the refusal of the master to give the twenty-third ruling requested by the defendants.

28. To the refusal of the master to give the twenty-fourth ruling requested by the defendants.

29. To the refusal of the master to give the twenty-fifth ruling requested by the defendants.

30. To the refusal of the master to give the twenty-sixth ruling requested by the defendants.

31. To the refusal of the master to give the twenty-eighth ruling requested by the defendants.

32. To the refusal of the master to find in accordance with the twenty-ninth request of the defendants.

33. To the refusal of the master to find in accordance with the thirtieth request of the defendants.

34. To the refusal of the master to find in accordance with the thirty-first request of the defendants.

35. To the refusal of the master to find in accordance with the thirty-second request of the defendants.

36. To the refusal of the master to find in accordance with the thirty-third request of the defendants.

127 37. To the refusal of the master to find in accordance with the thirty-fourth request of the defendants.

38. To the refusal of the master to find in accordance with the thirty-fifth request of the defendants.

LUDLOW CORDAGE CO.,
By WILLIAM H. BROOKS,
(R.),
JAMES B. CARROLL,
(R.),
WALTER S. ROBINSON,
Its Att'ys.

Filed December 17, 1903.

[Endorsed:] 569 Eq. Otis Company *vs.* Ludlow Manufacturing Company *et al.* Exceptions of Ludlow Cordage Co. to master's report. 17 Dec. 1903.

128 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MFG. CO. ET AL.

Report of Case.

The above entitled case was heard by me for final decree upon the master's report and the objections and exceptions thereto of the plaintiff and defendants. I reserve and report the case and all questions of law therein including those raised by the objections and exceptions of each of the parties for the consideration of the full court. All exhibits introduced in evidence before the master were made a part of his report and are made a part of this report.

FRANCIS A. GASKILL, J. S. C.

Filed Jan. 4, 1904.

129 (Copy.)

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, May 20, 1904.

In the case of Otis Company *vs.* Ludlow Mfg. Co. *et al.*, pending in the superior court for the county of Suffolk,

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz.:

Bill dismissed with costs.

May 20, 1904.

By the court,

C. H. COOPER, Clerk.

Copy,
Att.

____ ____,
Clerk of Superior Court.

[Endorsed:] Brief statement of the grounds and reasons of the decision: The rulings of the master were correct. (See opinion.)

130 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court, April Sitting.

OTIS COMPANY
v.
LUDLOW MANUFACTURING COMPANY ET AL.

Final Decree after Rescript.

This cause came on *the* be further heard at this sitting, after the entry of the rescript from the supreme judicial court, and thereupon, upon consideration thereof and in accordance with said rescript, it is ordered, adjudged and decreed that the bill be, and hereby is, dismissed with costs in the sum of forty-one dollars and thirteen cents.

By the court,

GEORGE E. KIMBALL,
Ass't Clerk.

July 1, 1904.

131 UNITED STATES OF AMERICA.

COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Petition for Writ of Error.

To the honorable the justices of the superior court of the Commonwealth of Massachusetts holden at Boston within and for the county of Suffolk:

Your petitioner, The Otis Company, a corporation duly organized under the laws of said Commonwealth and having its usual place of business in said Boston show- unto your honors that heretofore, to wit, on the first day of July, A. D. 1904, at Boston in said county of Suffolk in said State of Massachusetts, in a suit in equity in said superior court in and for said county in which your petitioner was plaintiff and The Ludlow Manufacturing Company and The Ludlow Cordage Company, each a corporation organized under the laws of said Commonwealth and having its usual place of business in said

Boston, were defendants, a final judgment and decree was rendered against your petitioner, said court being the highest court of law or equity of the said State in which a decision in said suit could be had.

And your petitioner says that in said suit there was drawn in question the validity of a statute of and an authority exercised under the United States, and the decision aforesaid was against their validity; and in said suit there was drawn in question the validity of a statute of and authority exercised under said State, on
132 the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision aforesaid was in favor of such their validity; and in said suit there was drawn in question the construction of a clause of the Constitution of the United States, and the decision aforesaid was against the title, right, privilege and exemption specially set up and claimed by your petitioner under such clause of said Constitution; and a manifest error hath happened in said suit and judgment, to the great damage of your petitioner as appears by the assignments of error hereto annexed;

Wherefore your petitioner prays that a writ of error to the Supreme Court of the United States may issue in due form of law, to the end that said error shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf.

OTIS COMPANY,
By HURLBURT, JONES AND CABOT,
BOYD B. JONES,
Its Solicitors.

Petition filed and allowed July 9, 1904.

133 UNITED STATES OF AMERICA, State of Massachusetts, } ss:

OTIS COMPANY, Plaintiff in Error,
v.
LUDLOW MANUFACTURING COMPANY ET AL., Defendants in Error.

Assignment of Errors.

The Otis Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston in the county of Suffolk in said Commonwealth, the plaintiff in the suit in equity lately pending in the superior court of said Commonwealth in and for the county of Suffolk, entitled Otis Company *vs.* Ludlow Manufacturing Company *et al.* defendants, wherein was drawn in question the validity of a statute of the State of Massachusetts, being chapter 190 of the Public Statutes of said State, reënacted chapter 196 of the Revised Laws of

Massachusetts, on the ground that said statute is repugnant to the 14th amendment of the Constitution of the United States and the due process clause thereof, being aggrieved by the rulings, final judgment and decree of said court in said cause, which said rulings, final judgment and decree are in favor of the validity of said statute and are in derogation of the rights of the plaintiff under the aforesaid provision of the Constitution of the United States, hereby assigns the following errors in said rulings, final judgment and decree, namely:—

1. Said superior court erred in dismissing the plaintiff's bill of complaint.

134 2. Said superior court erred in not ruling, deciding and decreeing that said Red Bridge dam was unlawfully erected by the defendant Ludlow Manufacturing Company in violation of the rights of the plaintiff.

3. Said superior court erred in not ruling, deciding and decreeing that the plaintiff was entitled to have said dam abated so as not to flow and injure the said mill site, mill, water power and property of the plaintiff.

4. Said superior court erred in not ruling, deciding and decreeing that the plaintiff was entitled to relief in equity against the erection and maintenance of the dam of the Ludlow Manufacturing Company, to wit, said Red Bridge dam.

5. Said superior court erred in ruling and deciding that said statute is not in conflict with the clause of the said 14th amendment to the Constitution of the United States forbidding any State to deprive any person of property without due process of law.

6. Said superior court erred in ruling and deciding that said statute does not deprive the plaintiff of its property without due process of law in violation of the said 14th amendment of the Constitution of the United States.

7. Said superior court erred in ruling and deciding that said statute and said occupation of said Red Bridge mill site and said erection and maintenance of said Red Bridge dam by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th amendment of the Constitution of the United States.

8. Said superior court erred in ruling and deciding that said statute and said commencement of said occupation of said

135 Red Bridge mill site by said Ludlow Manufacturing Company does not deprive the plaintiff of its property without due process of law in violation of the said 14th amendment of the Constitution of the United States.

9. Said superior court erred in ruling and deciding, that inasmuch as the taking of the property of the plaintiff under the authority of the aforesaid statute was under the police powers of said State, the plaintiff was not entitled to the title, right, privileges and immunities secured by the aforesaid clause of said 14th amendment to persons deprived of their property.

10. Said superior court erred in ruling and deciding that the erection and maintenance of said Red Bridge dam, under the authority of the aforesaid statute, by said Ludlow Manufacturing Company, so as to flow and injure said mill site, mill water power and property of the plaintiff, did not entitle the plaintiff to just compensation for the damages to the plaintiff for its property so taken as required by due process of law under the aforesaid 14th amendment.

11. Said superior court erred in ruling and deciding that said statute makes due provision for just compensation for the property of the plaintiff taken thereby and by authority thereof as required by due process of law under the aforesaid 14th amendment.

12. Said superior court erred in ruling and deciding that the provisions of said statute for the determination and payment of damages to the plaintiff for its property taken by virtue of or under the authority of said statute are a sufficient provision for just compensation to the plaintiff as required by due process of law under the aforesaid 14th amendment, and are not in conflict with said clause of said amendment.

136 13. Said superior court erred in ruling and deciding that the provisions of said statute for compensation to the plaintiff for damages sustained by the erection and maintenance of said Red Bridge dam, under the authority of said statute, are adequate to meet the requirements of said clause of the aforesaid 14th amendment, even though said statute does not require or provide just compensation to the plaintiff for the property taken.

14. Said superior court erred in ruling and deciding that the requirements of said statute, for the determination and payment of damages to the plaintiff for its property taken under and by authority of said statute, are a sufficient provision for just compensation to the defendants as required by due process of law under the aforesaid 14th amendment.

15. Said superior court erred in ruling and deciding that due process of law under said 14th amendment does not require that the act of appropriating or taking the plaintiff's property under the police power of the State should be clear and intelligible.

16. Said superior court erred in ruling and deciding that the occupation by the Ludlow Manufacturing Company of the Red Bridge mill site under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

137 17. Said superior court erred in ruling and deciding that the commencement of the occupation of said Red Bridge mill site by said Ludlow Manufacturing Company under the authority

of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been made or was to be made, was a valid appropriation of the water power, property and rights of the plaintiff whereby the Ludlow Manufacturing Company acquired a right to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said statute so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

18. Said superior court erred in ruling and deciding that the said commencement of the construction of said tail race on August 3, 1899, by said Ludlow Manufacturing Company, under the authority of said statute, although so ambiguous and unintelligible as not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said section so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

19. Said superior court erred in ruling and deciding that the said commencement of the construction of said tail race on August 3, 1899, by said Ludlow Manufacturing Company under the authority of said statute, although so ambiguous and unintelligible as
138 not to indicate that any appropriation of the water power, property or rights of the plaintiff had been or was to be made, entitled the Ludlow Manufacturing Company to thereafter erect and maintain said Red Bridge dam in accordance with the provisions of said section so as to flow out and injure the said dam, mill site, mill and water power of the plaintiff, and that said statute and such authority was not repugnant to the aforesaid clause of the 14th amendment.

20. Said superior court erred in not ruling and deciding that the said statute and the said acts of said Ludlow Manufacturing Company under the authority thereof deprived the plaintiff of its property without due process of law in violation of said clause of said 14th. amendment.

21. Said superior court erred in not ruling and deciding that said statute is repugnant to said clause of said 14th amendment, in that the provisions of said statute for compensation to the plaintiff for the property of which it was deprived under the authority of said statute are not reasonably certain and adequate.

OTIS COMPANY,
By HURLBURT, JONES AND CABOT,
BOYD B. JONES, Its Solicitors.

Filed July 9, 1904.

139 Bond on Writ of Error.

Know all men by these presents, that we, the Otis Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston in said Commonwealth, as principal, and George F. Fabyan and Peder Olsen both of Brookline in the county of Norfolk in said Commonwealth, as sureties, *and* held and firmly bound unto the Ludlow Cordage Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in said Boston in the full and just sum of five hundred dollars to be paid to the said Ludlow Cordage Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixth day of July in the year of our Lord one thousand nine hundred and four.

Whereas, lately in the superior court of the Commonwealth of Massachusetts, holden in Boston in the county of Suffolk on the first day of July, A. D. 1904, in a suit depending in said court between said Otis Company plaintiff and The Ludlow Manufacturing Company, a corporation duly organized under the laws of said Commonwealth, and having its usual place of business in said Boston, and the said Ludlow Cordage Company defendants, a final judgment and decree was rendered against the said Otis Company and the said Otis Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse
140 the judgment in the aforesaid suit, and a citation directed to the said Ludlow Manufacturing Company and the said Ludlow Cordage Company citing and admonishing them to be and appear at a Supreme Court of the United States at Washington on the twenty sixth day of July current.

Now, the condition of the above obligation is such, that if the said Otis Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OTIS COMPANY,
By CHARLES H. FISKE, Pres't. [SEAL.]
GEO. F. FABYAN. [SEAL.]
PEDER OLSEN. [SEAL.]

Sealed and delivered in presence of—
CHARLES R. WIGGIN.

Approved:
ALBERT MASON,
Chief Justice Superior Court.

Bond filed and allowed July 9, 1904.

141 Bond on Writ of Error.

Know all men by these presents, that we, the Otis Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Boston in said Commonwealth, as principal, and George F. Fabyan and Peder Olsen both of Brookline in the county of Norfolk in said Commonwealth, as sureties, are held and firmly bound unto the Ludlow Manufacturing Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in said Boston in the full and just sum of five hundred dollars, to be paid to the said Ludlow Manufacturing Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this sixth day of July in the year of our Lord one thousand nine hundred and four.

Whereas, lately in the superior court of the Commonwealth of Massachusetts, holden at Boston in and for the county of Suffolk on the first day of July, A. D. 1904, in a suit depending in said court between said Otis Company plaintiff and said Ludlow Manufacturing Company and the Ludlow Cordage Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, and having its usual place of business in said Boston, defendants, a final judgment and decree was rendered against the said Otis Company and the said Otis Company having obtained a writ of
142 error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Ludlow Manufacturing Company and said Ludlow Cordage Company citing and admonishing them to be and appear at a Supreme Court of the United States at Washington on the twenty sixth day of July current.

Now, the condition of the above obligation is such, that if the said Otis Company shall prosecute its said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

OTIS COMPANY,
By CHARLES H. FISKE, Pres't. [SEAL.]
GEO. F. FABYAN. [SEAL.]
PEDER OLSEN. [SEAL.]

Sealed and delivered in presence of—
CHARLES R. WIGGIN.

Approved:
ALBERT MASON,
Chief Justice of Superior Court.

Bond filed and allowed July 9, 1904.

143 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

OTIS COMPANY
vs.
LUDLOW MANUFACTURING CO. ET AL.

Stipulation of Parties.

The parties in the above entitled cause agree that the exhibits introduced in evidence before the master and made a part of the reservation and report of the case by the justice of the superior court for the consideration of the full court are more than two hundred in number, consisting of letters, deeds, plans, contracts and photographs; that so far as the said exhibits and parts thereof may be material to the Federal questions involved in the cause, the same are recited in the master's report; and that, excepting the recital thereof in the master's report and excepting Plaintiff's Exhibit Blue Print "Plan of land of Otis Company on Chicopee river dated February 1902 by J. K. Barker engineer" and excepting Defendants' Exhibit Colored Map of Defendants' Lands, they may be omitted from the transcript of the record to be sent up as a return to the writ of error issued upon the petition of the plaintiff and returnable to the Supreme Court of the United States.

HURLBURT, JONES & CABOT,
BOYD B. JONES,
Attorneys for Plaintiff.
WALTER S. ROBINSON,
Attorney for Defendants.

Filed July 23, 1904.

144 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court. In Equity.

OTIS COMPANY
vs.
LUDLOW MFG. CO. & Another.

Counsel for complainant Hurlburt, Jones & Cabot.
Counsel for respondent Brooks & Hamilton Carroll & McClintock (Springfield)

Copy of Docket Entries.

Bill entered, October 15, 1901.—Subpœna returnable November iss'd. Oct. 29, subpœna returned (1)—Oct. 31, plaintiff's motion for temporary injunction (2) denied without prejudice by decree (3)—

November 8, answer of Ludlow Mfg. Co. (4) of Ludlow Cordage Co. (5)—

1902, April 4.—Interlocutory decree referring cause to James R. Dunbar, Esq., special master (6)—May 21, plaintiff's motion to amend bill (7) by consent.—Plaintiff's amended bill (8) by consent. May 24. Answer of Ludlow Mfg. Co. to amended bill (9); of Ludlow Cordage Co. (10)—

1903, December 7.—Plaintiff's amended bill (11) by consent—Answer of Ludlow Cordage Co. to plaintiff's 2d amended bill (12) by consent; of Ludlow Mfg. Co. (13) by consent.

December 10 master's report (14)—December 17, exceptions to master's report of Ludlow Mfg. Co. (15); of Ludlow Cordage Co. (16)—December 18, plaintiff's exceptions to master's report (17)—

1904, January 4.—Report to supreme judicial court (18) Jan. 5, complainant's replication as of December 2, 1903 (19)—May 21, rescript S. J. C. "Bill dismissed with costs" (20)

145 1904, July 1.—Final decree after rescript (21)—

July 9, petition for writ of errors (22)—Assignment of error (23) Bond to Ludlow Cordage Company (24)—Bond to Ludlow Manufacturing Company (25)—Writ of error granted.

July 23, stipulation (26).

146 COMMONWEALTH OF MASSACHUSETTS, Suffolk, } ss:

Superior Court.

I Edw'd A. Willard, assistant clerk of the superior court for the said county of Suffolk, hereby certify that the copies hereto attached to the writ of error and the citation thereon—pages numbered in red ink 1 to 145 are true copies of the papers, records, of the assignment of errors and of all the proceedings in the equity cause, Otis Company vs. Ludlow Manufacturing Company and another, and annexed hereto and transmitted herewith is a copy of the opinion of the supreme judicial court of the Commonwealth of Massachusetts attested by Henry Walton Swift, reporter of decisions, and also the plaintiff's "plan of land of Otis Company on Chicopee river dated February 1902 by J. K. Barker engineer" and the colored map of defendants' lands mentioned in the master's report and the stipulation of the parties filed July 23, 1904.

In testimony whereof the clerk of said court being absent from the Commonwealth I have hereunto set my hand and affixed the seal of our superior court at Boston in the county of Suffolk, this twenty-seventh day of July A. D. 1904, by virtue of the statute in such case made and provided.

Seal of the Superior Court.

EDW'D A. WILLARD,
Assistant Clerk.

147 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, July 1, 1904.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Otis Company vs. Ludlow Manuf. Company *et al.* decided on the 20th day of May, 1904.

HENRY WALTON SWIFT,
Reporter of Decisions.

148 OTIS COMPANY
v.
LUDLOW MANUFACTURING COMPANY ET AL.

KNOWLTON, *C. J.*:

The plaintiff, a riparian proprietor upon the Chicopee river, has lately built across the stream a dam 19.29 feet high and three hundred and fifty-three feet long, with a length upon the rollway of two hundred and ten feet. Its expenditure for this development of power was two hundred and seventy-one thousand dollars. The water power is used to generate electricity, which is conducted about three-quarters of a mile up the stream to the plaintiff's factory at Three Rivers in Palmer, and there applied to the plaintiff's motors. This factory previously had been run in part by water power taken from the river further up, and in part by steam power.

The first mentioned defendant, The Ludlow Manufacturing Company, which will hereinafter be called the defendant, is also a riparian proprietor upon the river, and at a point two miles below the plaintiff's dam, it has lately built a dam whose height is fifty-one feet, whose length is eight hundred and eighty feet, and the length of whose rollway is three hundred feet. The defendant's expenditure for this development of power was eight hundred thousand dollars. This dam was built to enable the defendant to generate electricity to be conducted about four miles down the stream to furnish additional power for use at the defendant's old factories and at a new one in Ludlow. The defendant's dam sets back water upon the plaintiff's dam in such a way as very greatly to diminish
149 the water power there, and this bill is brought to enjoin the defendant from maintaining the dam and setting back the water.

The defendant became the owner in fee, in 1891, of certain land which includes the site of this present dam and the accompanying structures. In 1894, and again in 1898, it employed an engineer to take levels and make surveys, plans and soundings along and upon the property, for the purpose of determining whether or not it was practicable to erect a mill dam upon the site of the dam since completed, and he did the work for which he was employed. In January, 1899, the defendant employed one Ball, a civil and hydraulic

engineer of experience, and the contract with him recited that the defendant had determined to erect a mill dam on this site, and required him to proceed immediately to make surveys, cross-sectionings, soundings, plans and estimates necessary for the erection of the dam, with raceways, canals and other structures, and to do such other things as might be necessary for the proper development of the water power on this mill site. Immediately thereafter the defendant determined upon the present height and present site of the dam. Ball and the defendant's other agents and employees commenced without delay the work of preparation for building the dam and other structures, and making said development, and they prosecuted it and the work of construction of the dam and other structures continuously and with due diligence to the completion thereof within a reasonable time. The actual work of building the dam was begun on August 3, 1899, with the commencement of the construction of the tail race, and
150 within a reasonable time after making this beginning, the defendant completed the dam with all its appurtenances, and all the transmission lines and mechanism for the utilization of the water power in connection with a new mill which it had built near its other mills at Ludlow, and in connection with the other mills previously constructed, for the working of which this power was to be used. This work was completed and the power was ready to be utilized on October 16, 1901, and the mills were put in operation with the power, but the use of it was suspended by the bringing of this suit.

On the fourth day of April, 1900, the plaintiff determined to build a dam at the site of its present dam, and then began its preparatory work therefor, and prosecuted this work with due diligence until the eleventh day of August, 1900, when it began the work of excavating for the foundations of its dam, and from this latter date it continuously prosecuted the work of construction with due diligence to the completion within a reasonable time of its dam and all appurtenances necessary for the utilization of the power. This work was completed on July first, 1901.

Each part of the work of building its dam, the preliminary, the preparatory and the permanent work, was begun by the defendant before the corresponding part of the work of building the plaintiff's dam was begun by the plaintiff. The plaintiff's dam was completed first.

The principal question in the case is, What is the construction of the mill act as applied to these facts? The Pub. Sts. c. 190, s. 2 (R. L. c. 196, s. 2) is as follows: "No such dam shall be erected to the injury of a mill lawfully existing either above or below
151 it, nor to the injury of a mill site on the same stream on which a mill or mill dam has been lawfully erected and used, unless the right to maintain the mill on such last mentioned site has been lost or defeated by abandonment or otherwise; nor shall a mill dam be hereafter erected or raised to the injury of any such

mill site which has been occupied by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied," etc.

The plaintiff contends that the defendant has violated that part of the statute which forbids the erection of a dam to the injury of an existing mill site on which a mill dam has been lawfully erected; and the defendant contends that the erection of the plaintiff's dam was a violation of that part of the statute which forbids the erection of a mill dam to the injury of a mill site which has been occupied by the owner thereof, when the owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill, for the working of which the water of such stream is applied.

The statute was enacted for the regulation of the rights of property owners upon streams adapted to use for the supply of power. The framers of it recognized the fact that such property, in many cases, could not be used judiciously by an owner for a short distance along the stream, without affecting the property of
152 other owners above and below, and preventing a like use of the stream for mill sites on other land. An enforcement by riparian proprietors of their rights at common law would often make it impossible for any of them to use water power effectively. Therefore, their personal interests, as well as the interests of the public, call for legislation modifying the common law, and regulating the rights of owners of this peculiar kind of property. Our mill act is intended to meet this requirement in a way to promote the development of water power from streams for the benefit of individual owners no less than for that of the general public. Lowell *v.* Boston, 111 Mass., 454–464. The framers of the statute foresaw the possibility of a desire of two riparian proprietors owning lands near together on the same stream, each to establish a mill on his own land, when an advantageous use of the water for power would make it impracticable to maintain a mill in more than one of the two places. It was proper to provide for such cases by statute. Accordingly, we have the provision last above quoted. This is, in substance, that as between riparian proprietors so situated, priority of appropriation shall give the better right. The legislature might have established a different rule. If the time of completion of a mill had been adopted as the time which should determine precedence in the right to use the water, there would have been an inducement to owners to engage in a race to see which could first get the water upon his wheel. In different ways the results of such a rule would have been harmful. The rule prescribed by the statute calls for an actual appropriation of the site to use for the development of water power, followed
153 by a completion of the work and the actual use of the water within a reasonable time. This is substantially the construction which was put upon the St. 1795, c. 74, in the case of Bigelow *v.* Newell, 10 Pick., 348, although that statute contained no special

provision touching this subject. The Rev. Sts. c. 116, s. 2, was in different language from the former act, and contained a prohibition of the erection of a dam to the injury of any mill site on the same stream. Under this statute the case of Baird *v.* Wells, 22 Pick., 312, was decided, in which it was held that the Revised Statutes had changed the law, and that the remedy of one who had begun his mill, but had not finished it until after another mill interfering with his had been completed, was by an assessment of damage under the mill act. Thereupon the legislature passed the St. 1841, c. 18, which is found in almost identical language in that part of the Pub. Sts., c. 190, s. 2, on which the present defendant relies. This enactment restored the rule stated in Bigelow *v.* Newell, 10 Pick., 348, which was held to have been changed by the Rev. Sts., c. 116, s. 2. Storm *v.* Manchaug Company, 13 Allen, 10–15. That this is the true construction of this statute is further indicated by the language used in other cases. Dean *v.* Colt, 99 Mass., 486–487. Fitch *v.* Stevens, 4 Met., 426–428. See also Washburn on Easements, 4th ed., 467–468. For general discussion of the law, see Fuller *v.* Chicopee Manufacturing Company, 16 Gray, 43. Fisk *v.* Framingham Manufacturing Company, 12 Pick., 68. Fitch *v.* Stevens, 4 Met., 426. Carey *v.* Daniels, 8 Met., 466. Gould *v.* Boston Duck Company, 13 Gray, 442. Smith *v.* Agawam Canal Company, 2 Allen, 355–356.

154 The plaintiff contends that the language of the statute, on which the defendant relies, applies only to owners on the stream below, and forbids their building a dam to the injury of an upper proprietor who has appropriated the power by beginning to build a dam which he completes within a reasonable time, and uses in connection with a mill, and that it does not apply to an owner on the stream above, who completes a dam, and seeks to have it remain with the outflow from the tail race undisturbed by back water from the dam of one who, in like manner, had previously appropriated the power at a point below. We are of opinion that this would be too narrow a construction of the provision. The building of a dam by an upper proprietor, for which he claims the common law right of a riparian owner to have the water flow down the stream without obstruction, would, if the claim were valid, be a great injury to the property of a proprietor below who had previously appropriated the power, but had been unable to complete his dam as soon as the upper dam was completed. In such a case, if the upper dam were protected as lawfully built under the mill act, in reference to a right to have the water flow freely away from it for the creation of power, the injury would be as great as it would be if a dam were built below which set back water upon a previously appropriated mill site above. The result would be that which is sought by the plaintiff in the present case, namely, a requirement that the dam below should be lowered so as not to set back water upon the upper mill. The reason for the enactment of the

155 statute seems to require us to hold it applicable to a proper appropriation of water power in a stream, whether above or

below the place where another subsequently begins to build, with the hope of preceding the other in the completion of his work.

This is in accordance with decisions in other States under similar statutes. Miller *v.* Troost, 14 Minn., 365–369. Kelley *v.* Natoma Water Company, 6 Cal., 105. Kimball *v.* Gearhart, 12 Cal., 27. Irwin *v.* Straight, 18 Nev., 436.

The plaintiff contends that the statute so construed is unconstitutional. We do not deem it necessary to consider at length the constitutionality of this statute. It has often been considered and discussed in previous decisions, and it has uniformly been affirmed. It is urged that the provision for the payment of damages is inadequate. This argument is founded mainly on an assumption that there is a taking of property under the right of eminent domain; but whatever may be the interference with the use of neighboring property by an appropriation of a mill site, it is not a taking under the right of eminent domain. Murdock *v.* Stickney, 8 Cush., 113. Hazen *v.* Essex Company, 12 Cush., 475. Lowell *v.* Boston, 11 Mass., 454–464. Turner *v.* Nye, 154 Mass., 579. Head *v.* Amoskeag Manufacturing Company, 113 U. S., 9. It is unnecessary to determine, in this case, what constitutional rights one has, in reference to damages for an interference by statute with his right at common law to use the water of a stream without obstruction, where such interference is permitted in the regulation of the rights of different owners, as
156 necessary to an advantageous use of the power; nor is it important now to decide what principles will hereafter be applied in assessing the damages of the present plaintiff, in view of existing conditions. It is enough to say that in our opinion the provision for compensation for damages is adequate to meet such constitutional requirements as are applicable to a statute of this kind. Even in cases arising under statutes which authorize an exercise of the right of eminent domain, it has been held that similar provisions are sufficient to satisfy the language of the Constitution. Boston and Roxbury Corporation *v.* Newman, 12 Pick., 467; Brickett *v.* Haverhill Aqueduct Company, 143 Mass., 394.

The plaintiff contends that the defendant was precluded from erecting a dam which would interfere with the right to use water power secured to the plaintiff as between it and one Metcalf, by a parol contract in writing with Metcalf, made on September 26, 1882, but not recorded. This agreement was made in connection with a proposed conveyance from Metcalf to the plaintiff of certain land on the river, and a proposed contemporaneous conveyance from the plaintiff to Metcalf of other land. In it each agreed with the other not to construct a dam for the development of his or its power, which should afford more than a prescribed number of feet fall that represented the extent of the power that was allowed to each, namely, 19.65 feet fall to the plaintiff and 21.32 feet fall to Metcalf. Conveyances of land were subsequently made by each to the other in pursuance of this agreement, and Metcalf afterwards con-
157 veyed his land to the Ludlow Cordage Company, a corporation which holds it, as the master has found, for the benefit

of the defendant as the equitable owner. The master also found that the defendant procured the sale from Metcalf to the Ludlow Cordage Company for its benefit, with full knowledge of this agreement.

We need not determine the effect of this contract in all particulars, for if we should assume in favor of the plaintiff that it was not merely a personal contract with Metcalf, but one which binds subsequent purchasers of this land who take notice of it, we are of opinion that it is of no effect in the present case. It was an agreement made in reference to the use of the lands then owned by the respective parties, and of those which would come to them subsequently through the proposed conveyances. If a purchaser of either lot, with notice of the agreement, would be bound not to use it in violation of the agreement, it does not follow that such a purchaser would be deprived of his right to use other lands which he might chance to own, in any lawful way. The land on which the defendant's dam was erected is nearly two miles further down the stream then the land which Metcalf owned, to which the agreement pertains. The dam was erected under the mill act, by virtue of the defendant's right as a riparian proprietor at the point where the mill site was established. The agreement was either a mere personal contract of Metcalf, or it was a contract connected with his land, which, in equity, would follow the land in the possession of a subsequent owner who took it with notice. If it follows the
158 land, it has no effect upon the rights of the defendant as the owner of other land below. The ruling of the master on this part of the case was right.

Bill dismissed with costs.

159 [Endorsed:] Otis Co. *vs.* Ludlow Manuf. Co. Certified copy of the opinion of the supreme judicial court. J. & K.

160 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Otis Company a corporation duly organized under the laws of said Commonwealth and having its usual place of business in said Boston in said county plaintiff and The Ludlow Manufacturing Company and The Ludlow Cordage Company, each a corporation duly organized under the laws of said Commonwealth and having a usual place of business in said Boston defendants, in a suit in

equity wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said Otis Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twenty-sixth day of July current, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the ninth day of July, in the year of our Lord one thousand nine hundred and four.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
Per BENJ. H. BRADLEE, Deputy Clerk.

Allowed by
ALBERT MASON,
Chief Justice Superior Court.

161 B.

COMMONWEALTH OF MASSACHUSETTS, *ss*:

And now, here, the judges of the superior court, make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I Edw'd A. Willard, assistant clerk of said superior court, the clerk of said court being absent from the Com-

monwealth, by virtue of the statute in such case made and provided, have hereunto set my hand and the seal of said court this twenty-seventh day of July, A. D. 1904.

[Seal of the Supreme Court.]

EDW'D A. WILLARD,
Assistant Clerk.

162 L.

Citation on Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Ludlow Manufacturing Company and the Ludlow Cordage Company, each a corporation duly organized under the laws of the Commonwealth of Massachusetts and having its usual place of business in Boston, in the county of Suffolk, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, on the *twenty-sixth day of July current, pursuant to a writ of error filed in the clerk's office of the †superior court of the Commonwealth of Massachusetts within and for the county of Suffolk in said Commonwealth wherein The Otis Company, a corporation duly organized under the laws of said Commonwealth and having its usual place of business in said Boston is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable chief justice of the superior court of the Commonwealth of Massachusetts, this ninth day of July, in the year of our Lord one thousand nine hundred and four.

ALBERT MASON,
Chief Justice Superior Court.

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*Not exceeding 30 days from the day of signing.
†Name of court to which writ of error is directed.

163 UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

BOSTON, July 13th, 1904.

I hereby certify that on the 13th day of July, 1904, I served the within citation by giving in hand to C. N. Wallace agent for the within named Ludlow Manufacturing Company at Boston who was in charge of its business a true and attested copy of this citation.

At the same time and place I gave to the said C. N. Wallace a like copy duly attested for the within named The Ludlow Cordage Company said Wallace being its vice-president who was in charge of its business.

J. H. WATERS,
Deputy United States Marshal.

[Endorsed:] United States marshal's office, room 101 P. O. building. Jul- 13 1904 Boston, Mass.
Endorsed: Hurlburt, Jones & Cabot. Boyd B. Jones.

164 UNITED STATES OF AMERICA:

Supreme Court of the United States.

THE OTIS COMPANY, Plaintiff in Error,
vs.
LUDLOW MANUFACTURING COMPANY ET AL.

Stipulation of Parties.

Because of the great expense of reproducing in the printed record the two large maps which are a part of the transcript of the record in the above entitled case, the parties thereto agree that said maps need not be reproduced in the printed record, but may be referred to by counsel in their argument and by the court.

WM. H. MOORE,
For Pl'f in Error.
FREDERICK H. NASH,
For Defendants in Error.

165 [Endorsed:] File No. 19,434. Supreme Court U. S. October term, 1905. Term No. 73. The Otis Company, pl'ff in error, *vs.* The Ludlow Manuf'g Co. *et al.* Stipulation to omit maps in printing record. Filed July 20th, 1905.
Endorsed on cover: File No. 19,434. Massachusetts superior court. Term No. 73. The Otis Company, plaintiff in error, *vs.* The Ludlow Manufacturing Company and The Ludlow Cordage Company. Filed August 6th, 1904. File No. 19,434.